TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 788.

CHRISTOPHER C. WILSON, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED NOVEMBER 18, 1910.

(22,409.)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 12, 1911.

1 Circuit Court of the United States in and for the Southern District of New York.

In the Matter of the Application of C. C. WILSON for a Writ of Habeas Corpus.

Petition for Writ of Habeas Corpus.

To the Honorable the Judges of the Circuit Court in and for the Southern District of New York:

The petition of C. C. Wilson, for a Writ of Habeas Corpus, respectfully shows:

1. That your petitioner is a citizen of the United States, and an inhabitant of the State of New York, and a resident of the City of New York, in this circuit and district.

2. That your petitioner is now, and for upwards of a year has been continuously, a director and the president of the United Wireless Telegraph Company, a corporation duly organized and existing under and by virtue of the laws of the State of Maine.

3. That your petitioner is now actually imprisoned and restrained of his liberty and detained by color of the authority of the United States, in the custody of William Henkel, Esq., United States Marshal, in and for the Southern District of New York, to wit, at the Borough of Manhattan of the City of New York, in said district.

4. That the sole claim or authority by virtue of which the said William Henkel, Marshal as aforesaid, so restrains and de-
2 tains your petitioner is a certain commitment in writing, a copy of which is hereto annexed marked "Exhibit A."

5. On information and belief that said commitment is an order of this Court made upon a certain presentment or report presented to and filed in this Court by the Grand Jury of the United States for the Southern District of New York on the 1st day of November, 1910, which said presentment is on file in this Court and to which your petitioner respectfully refers and begs to make a part hereof.

6. That your petitioner's imprisonment, restraint and detention are without authority of law whatsoever, and in violation of his rights, privileges and immunities under the Constitution and laws of the United States, for the following reasons:

(*a*) That this Court was without jurisdiction under the said Constitution and laws by reason of any of the matters or things contained and set forth in said presentment of the Grand Jury, to entertain any charge of contempt against your petitioner, or to act or proceed in any manner in the premises.

(*b*) That the day your petitioner attended before the said Grand Jury and was examined in the manner and under the circumstances disclosed by said presentment or report, there was no "cause" or "action" of any kind pending in this Court between the United States and any party mentioned in the paper called "subpœna duces tecum," a copy of which is annexed hereto and marked "Exhibit 1,"

in which your petitioner could be required under the Constitution and laws to testify or give evidence before the Grand Jury.

(*c*) The Grand Jury was not in the exercise of its proper and legitimate authority in prosecuting the alleged investigation
3 set out in the said presentment, the powers of a Federal Grand Jury being limited under the Constitution to the investigation of specific charges against particular persons, and there being under investigation by the Grand Jury at the time your petitioner attended before them no specific charges against any particular person.

(*d*) That the said paper called "subpœna duces tecum," hereto annexed and marked "Exhibit 1" is illegal, unauthorized and void for the reasons that it does not comply with Section 877 of the Revised Statutes of the United States, in that it requires the person addressed to appear, but does not require said person to attend; and in that it does not require the person addressed "to testify generally" on behalf of the United States; and because it was not issued pursuant to any order of the Court therefor; and because it is addressed to the corporation without mention of any individual or officer of said corporation; and because such a subpœna would not apprise the defendant in a prosecution which might follow, of the name of the precise witness who might have appeared pursuant thereto before the Grand Jury against him.

7. That your petitioner should not be held in contempt of Court for the following reasons, among others:

Because the "subpœna" in question was not directed to him, but was directed merely to the corporation; because your petitioner cannot be compelled to produce evidence, papers or documents which tend to incriminate him, your petitioner being already under two indictments, filed in the Court on August 3, 1910, charging your petitioner and others, one with the alleged fraudulent use
4 of the mails, the other with a conspiracy to commit an offense against the United States, and your petitioner being also the party mentioned in the said "subpœna" as the person alleged to have been guilty of violation of the statutes of the United States, which is the subject of said Grand Jury investigation.

8. That your petitioner is now, and for a long time past has been, in possession, custody and control of the book referred to in said "subpœna," and did not acquire such possession or custody in anticipation of these or any other proceedings, nor with any purpose of evading any subpœna or process issued or to be issued for the said papers. That your petitioner has, since the filing of the said two indictments against him, which are respectfully referred to and made a part of this application, been using the said book called for in said "subpœna" in the preparation of his defense thereto, and that his use of the said book is necessary and essential for the preparation of his said defense.

9. That the proceedings herein requiring your petitioner to produce the papers called for by the said "subpœna" are in violation of your petitioner's rights under the Fourth Amendment to the Con-

stitution of the United States, and also in violation of his rights under the Fifth Amendment to the Constitution of the United States.

10. Your petitioner is advised by counsel and verily believes, that for the reasons above stated the order adjudging him guilty of contempt, and his commitment pursuant thereto, were without legal right, authority or jurisdiction of any kind, and are utterly void and ineffectual, and that his detention and imprisonment thereunder are in violation of the Constitution of the United States and in violation of his rights, privileges and immunities thereunder.

Wherefore, your petitioner prays that a Writ of Habeas Corpus may issue directed to the said William Henkel, Esq., Marshal as aforesaid, or to any of his deputies, requiring him or them to bring and have your petitioner before this Court at a time to be by it determined, together with the true cause of his detention, to the end that due inquiry may be had in the premises, and that this Court may proceed in a summary way to determine the facts of the case in that regard, and the legality of your petitioner's imprisonment, restraint and detention, and thereupon to dispose of your petitioner as law and justice require. And your petitioner will ever pray.

Dated, New York City, November 1st, 1910.

C. C. WILSON, *Petitioner.*

——— ———,
Attorney for Petitioner.

Office and P. O. Address, No. 11 Pine Street, Borough of Manhattan, New York City.

UNITED STATES OF AMERICA,
Southern District of New York,
City, County, and State of New York, ss:

Christopher C. Wilson, being duly sworn, deposes and says, that he is the petitioner above named; that he has read the foregoing petition and knows the contented thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

C. C. WILSON.

Sworn to before me this 1st day of November, 1910.

PAUL COOKSEY,
Notary Public, New York County.

7 EXHIBIT "A."

At a Stated Term of the United States Circuit Court for the Southern District of New York, Held at the U. S. Court House & Post Office Building, in said District, on November 1, 1910.

Present: Hon. E. Henry Lacombe, Circuit Judge.

In the Matter of the Presentment for Contempt of Court of United Wireless Telegraph Company, Christopher C. Wilson, Cloyd Marshall, Charles C. Galbraith, Lucien C. Wallace, Edward P. Davis, William H. Sargent, and Frederick I. J. Hanson.

The Grand Jury of the United States Circuit Court for the Southern District of New York, having presented that United Wireless Telegraph Company and Cloyd Marshall, Charles C. Galbraith, Lucien C. Wallace, Edward P. Davis, William H. Sargent and Frederick I. J. Hanson, directors of said company, are in contempt of Court for failure to obey a certain subpœna duly issued out of this Court, dated October 28, 1910, and served on said United *States* Wireless Telegraph Company, calling for the production by said United Wireless Telegraph Company of letter press copy books of United Wireless Telegraph Company containing copies of letters and telegrams signed or purporting to be signed by the President of said Company, during the months of May and June, 1909; and that Christopher C. Wilson is in contempt of Court for knowingly and wilfully obstructing and preventing said United Wireless Tele-
8 graph Company and said Cloyd Marshall, Charles C. Galbraith, Lucien C. Wallace, Edward P. Davis, William H. Sargent and Frederick I. J. Hanson, directors thereof, from obedience to said subpœna, and for resisting said subpœna of this Court.

Now, after hearing the said presentment, and said United Wireless Telegraph Company, and said Christopher C. Wilson, Cloyd Marshall, Charles C. Galbraith, Lucien C. Wallace, Edward P. Davis, William H. Sargent and Frederick I. J. Hanson, directors thereof, having appeared to answer said presentment, and after hearing said United Wireless Telegraph Company and said Christopher C. Wilson, Cloyd Marshall, Charles C. Galbraith, Lucien C. Wallace, Edward P. Davis., William H. Sargent and Frederick I. J. Hanson, the directors thereof, it is hereby

Ordered and adjudged that Christopher C. Wilson is in contempt of this Court, as charged in said presentment, and

It is further ordered that said Christopher C. Wilson be committed to the custody of the United States Marshal for the Southern District of New York until he delivers to United Wireless Telegraph Company said books called for by said subpœna, and ceases to obstruct and impede the process of this Court, or otherwise purge himself of this contempt.

E. HENRY LACOMBE,
Circuit Judge.

9 EXHIBIT "1."

[SEAL.]

The President of the United States of America to United Wireless Telegraph Company, 42 Broadway, New York, N. Y., Greeting:

We command you, That all business and excuses being laid aside your appear before the Grand Inquest of the Body of the People of the United States of America for the Southern District of New York, at a Circuit Court to be held in the United States Court House and Post Office Building, Borough of Manhattan, City of New York, on the 31st day of October, 1910, at 11 o'clock in the forenoon, and that you produce at the time and place aforesaid, the following:

Letter press copy books of United Wireless Telegraph Company containing copies of letters and telegrams signed or purporting to be signed by the President of said company during the months of May and June, 1909; in regard to an alleged violation of the statutes of the United States by C. C. Wilson.

And for a failure to produce the aforesaid documents you will be deemed guilty of a contempt of Court, and liable to the penalties of the law.

Witness, the Honorable John M. Harlan, Senior Associate Justice of the United States, at the Borough of Manhattan, City of New York, the 28th day of October, 1910.

JOHN A. SHIELDS, *Clerk.*

HENRY WISE,
U. S. Attorney.

10 (Endorsed:) U. S. Circuit Court, Southern District N. Y., Filed Nov. 1, 1910. John A. Shields, Clerk.

11 The President of the United States to William Henkel, Esq., United States Marshal for the Southern District of New York, Greeting:

We command you that you have the body of C. C. Wilson, by you imprisoned and detained, as it is said, together with the time and cause of such imprisonment and detention, by whatsoever name he shall be called or charged, before the Circuit Court of the United States, in and for the Southern District of New York, in the Second Circuit, on the 4th day of November, 1910, at 11 o'clock in the forenoon of that day before Hon. E. H. Lacombe Cir. Judge at the Court room for hearing motions at the U. S. Post office building and receive what shall then and there be considered concerning the said C. C. Wilson; and have you then and there this writ.

Witness, the Hon. John M. Harlan, Senior Associate Justice of the Supreme Court of the United States, the 1st day of November, One thousand nine hundred and ten.

[SEAL.] JOHN A. SHIELDS,
Clerk of the Circuit Court of the United States
for the Southern District of New York.

The foregoing writ is hereby allowed. The petitioner may be admitted to bail in the sum of one hundred dollars pending the proceedings thereon.

ALFRED C. COXE,
United States Circuit Judge.

12 Discharged on bail for the relator's appearance November 4th, 1910 at 11 o'clock A. M.
Nov. 1, 1910.

JOHN A. SHIELDS,
U. S. Commissioner.

(Endorsed:) U. S. Circuit Court, Southern District N. Y., Filed Nov. 4, 1910, John A. Shields, Clerk.

13 At a Stated Term of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit, Held at the United States Court Rooms in the Borough of Manhattan, in the City of New York, on the 1st Day of November, in the Year of Our Lord One Thousand Nine Hundred and Ten.

Present: The Honorable Alfred C. Coxe, Circuit Judge.

In the Matter of the Application of C. C. WILSON for a Writ of Habeas Corpus.

Whereas bail pending the determination herein has been fixed by me at the sum of One Hundred Dollars, it is
Ordered that in lieu thereof cash bail in the sum of One Hundred Dollars may be deposited with John A. Shields, Clerk of the United States Circuit Court for the Southern District of New York for the appearance of said C. C. Wilson on Friday, November 4th, 1910.

ALFRED C. COXE,
U. S. Cir. Judge.

(Endorsed:) U. S. Circuit Court, Southern District N. Y., Filed Nov. 1, 1910, John A. Shields, Clerk.

14 *Return to Writ of Habeas Corpus.*

United States Circuit Court, Southern District of New York.

In the Matter of the Presentment for Contempt of Court of United Wireless Telegraph Company, Christopher C. Wilson, Cloyd Marshall, Charles C. Galbraith, Lucien C. Wallace, Edward P. Davis, William H. Sargent, and Frederick I. J. Hanson.

I, William Henkel, United States Marshal for the Southern District of New York, pursuant to a writ of habeas corpus herein, dated

November 1, 1910, hereby certify the following to be the cause of detention and imprisonment of Christopher C. Wilson:

Said Christopher C. Wilson was taken into my custody and detained on November 1, 1910, pursuant to an order of this Court, dated November 1, 1910, a copy of which is hereto annexed and marked "Exhibit A" and made a part of this return.

That said order was made pursuant to a presentment of the Grand Jury for the Southern District of New York to this Court on November 1, 1910; that on the 28th day of October, 1910, a subpœna duces tecum addressed to the United Wireless Telegraph Company duly issued out of this Court, a copy of which is hereto annexed and marked "Exhibit B."

That said subpœna was, on October 28, 1910, duly served upon said United Wireless Telegraph Company by exhibiting to Christopher C. Wilson, who was then and there President of said company, and to Cloyd Marshall, who was then and there the Secretary of said company, and to Charles C. Galbraith, who was then and
15 there a director of said company, said original subpœna duces tecum, and at the same time leaving with said persons copies thereof.

That said subpœna was further duly served upon said United Wireless Telegraph Company on October 29, 1910, by exhibiting to Lucien C. Wallace and to Edward P. Davis, who were then and there directors of said United Wireless Telegraph Company, said original subpœna duces tecum, and at the same time leaving with them copies thereof.

That said subpœna was further duly served upon said United Wireless Telegraph Company on October 31, 1910, by exhibiting to William H. Sargent and to Frederick I. J. Hanson, who were then and there directors of said company, said original subpœna, and at the same time leaving them copies thereof.

That on the 31st day of October, 1910, at Room 119, in the United States Court House and Post Office Building, that being the room regularly assigned to and occupied by the Grand Jurors for the Southern District of New York, the Grand Jurors of the United States for the Southern District of New York were duly assembled and in session and were inquiring into and considering alleged violations of the statutes of the United States by Christopher C. Wilson and others within the Southern District of New York, and then and there the said United Wireless Telegraph Company was duly called through the corridors of said United States Court House and Post Office Building to respond to the aforesaid subpœna, and thereupon the aforesaid Christopher C. Wilson, Cloyd Marshall, Lucien C. Wallace, Edward P. Davis, Charles C. Galbraith, William H. Sargent and Frederick I. J. Hanson entered said room where said Grand Jurors were in session and thereupon, in the presence of said persons and in the presence of said Grand Jurors, demand
16 was duly made by the foreman of said Grand Jury upon said United Wireless Telegraph Company to produce before said Grand Jurors for their inspection the letter press copy books called for in the aforesaid subpœna.

That in the presence of said Grand Jury and of the aforesaid persons and within said Grand Jury room, the aforesaid Christopher C. Wilson then and there had in his possession the letter press copy book called for in the aforesaid subpœna, but said letter press copy book was not then and there, upon demand being made, produced before said Grand Jurors for their inspection.

That thereupon the foreman of said Grand Jury, in the presence of said Christopher C. Wilson, Cloyd Marshall, Lucien C. Wallace, Edward P. Davis, Charles C. Galbraith, William H. Sargent and Frederick I. J. Hanson, and within the aforesaid room in which said Grand Jurors were then duly in session, directed said United Wireless Telegraph Company to produce said books called for in said subpœna before said Grand Jury on November 1, 1910, at eleven o'clock in the forenoon.

That on November 1, 1910, said Grand Jury was regularly in session at Room 119, United States Court House and Post Office Building, and were inquiring into and considering alleged violations of the statutes of the United States by Christopher C. Wilson and others within the Southern District of New York, and then and there the said United Wireless Telegraph Company was duly called through the corridors of the said United States Court House and Post Office Building to respond to the aforesaid subpœna, and thereupon the aforesaid Christopher C. Wilson, Cloyd Marshall, Lucien C. Wallace, Edward P. Davis, Charles C. Galbraith, William
17 H. Sargent and Frederick I. J. Hanson entered said room where said Grand Jurors were in session, and thereupon, in the presence of said persons and in the presence of said Grand Jurors, demand was duly made by the foreman of said Grand Jury upon said United Wireless Telegraph Company to produce before said Grand Jurors for their inspection the letter press copy books called for by the aforesaid subpœna.

That in the presence of said Grand Jury and of the aforesaid persons, and within said Grand Jury room, the aforesaid Christopher C. Wilson then and there had in his possession the letter press copy book called for by the aforesaid subpœna, but the said letter press copy book was not then and there, upon demand being made, produced before said Grand Jurors for their inspection, nor has said book been so produced before said Grand Jurors at any time, or delivered to said United Wireless Telegraph Company to enable it to obey the process of this Court, but he still retains possession of said books.

That annexed hereto is a copy of said presentment of said Grand Jury, and of all the proceedings had thereon, and marked "Exhibit C."

WILLIAM HENKEL,

United States Marshal for the Southern District of New York.

18

"EXHIBIT A."

At a Stated Term of the United States Circuit Court for the Southern District of New York, Held at the U. S. Court House & Post Office Building, in said District, on November 1, 1910.

Present: Hon. E. Henry Lacombe, Circuit Judge.

In the Matter of the Presentment for Contempt of Court of United Wireless Telegraph Company, Christoper C. Wilson, Cloyd Marshall, Charles C. Galbraith, Lucien C. Wallace, Edward P. Davis, William H. Sargent, and Frederick I. J. Hanson.

The Grand Jury of the United States Circuit Court for the Southern District of New York, having presented that United Wireless Telegraph Company and Cloyd Marshall, Charles C. Galbraith, Lucien C. Wallace, Edward P. Davis, William H. Sargent and Frederick I. J. Hanson, directors of said Company, are in contempt of Court for failure to obey a certain subpœna duly issued out of this Court, dated October 28, 1910, and served on said United Wireless Telegraph Company, calling for the production by said United Wireless Telegraph Company of letter press copy books of United Wireless Telegraph Company containing copies of letters and telegrams signed or purporting to be signed by the President of said Company, during the months of May and June, 1909; and that Christopher C. Wilson is in contempt of Court for knowingly and willfully obstructing and preventing said United Wireless Telegraph Company and said Cloyd Marshall, Charles C. Galbraith, Lucien C. Wallace, Edward P. Davis, William H. Sargent and Frederick I. J. Hanson, directors thereof, from obedience to said subpœna

19 and for resisting said subpœna of this Court.

Now, after hearing the said presentment, and said United Wireless Telegraph Company, and said Christopher C. Wilson, Cloyd Marshall, Charles C. Galbraith, Lucien C. Wallace, Edward P. Davis, William H. Sargent and Frederick I. J. Hanson, directors thereof, having appeared to answer said presentment, and after hearing said United Wireless Telegraph Company and said Christopher C. Wilson, Cloyd Marshall, Charles C. Galbraith, Lucien C. Wallace, Edward P. Davis, William H. Sargent and Frederick I. J. Hanson, the directors thereof, it is hereby

Ordered and adjudged that Christopher C. Wilson is in contempt of this Court, as charged in said presentment, and

It is further ordered that said Christopher C. Wilson be committed to the custody of the United States Marshal for the Southern District of New York until he delivers to United Wireless Telegraph Company said books called for by said subpœna, and ceases to obstruct and impede the process of this Court, or otherwise purge himself of this contempt.

E. HENRY LACOMBE,
Circuit Judge.

20 "EXHIBIT B."

[SEAL.]

The President of the United States of America to United Wireless Telegraph Company, 42 Broadway, New York, N. Y., Greeting:

We command you, That all business and excuses being laid aside, you appear before the Grand Inquest of the Body of the People of the United States of America, for the Southern District of New York, at a Circuit Court to be held in the United States Court House and Post Office Building, Borough of Manhattan, City of New York, on the thirty-first day of October, 1910 at 11:00 o'clock in the forenoon, and that you produce at the time and place aforesaid, the following:

Letter press copy books of United Wireless Telegraph Company containing copies of letters and telegrams signed or purporting to be signed by the President of said Company, during the months of May and June, 1909;

in regard to an alleged violation of the statutes of the United States by Christopher C. Wilson.

And for a failure to produce the aforesaid documents you will be deemed guilty of a contempt of Court and liable to the penalties of the law.

Witness, The Honorable John M. Harlan, Senior Associate Justice of the United States Supreme Court, at the Borough of Manhattan, City of New York, this 28th day of October, 1910.

JOHN A. SHIELDS, *Clerk.*

HENRY A. WISE,
United States Attorney.

21 Endorsements.

I hereby certify, that on the 28 day of October, 1910, at the City of New York, in my district, I served the within Subp. Duces Tecum upon the within named United Wireless Telegraph Co. by exhibiting to C. C. Wilson, as Pres. Cloyd Marshal as Sec'y & Chas. C. Galbraith as Director of said Co. at 42 B'way, N. Y. City the within original, and at the same time leaving with them a copy for each thereof.

I hereby certify, That on the 29 day of Oct., 1910, at the City of New York, in my district, I served the within Subp. D. T. upon the within-named United Wireless Telegraph Co. by exhibiting to Lucien C. Wallace & Edw. P. Davis as Directors of said Co. at 42 B'way the within original, and at the same time leaving with them a copy for each thereof.

WM. HENKEL.
United States Marshal
Southern District of New York.

Dated Oct. 29, 1910.
(J. W. P.)

I hereby certify, That on the 31st day of Oct. 1910, at the City of New York, in my district, I served the within Subp. Duces Tecum upon the within-named United Wireless Telegraph Co. by exhibiting to Wm. H. Sargent as Director of said Co. & Fred'k I. J. Hanson as Director of said Co. at N. Y. City the within original, and at the same time leaving with each of them a copy for each thereof.

WM. HENKEL,
United States Marshal
Southern District of New York.

Dated Oct. 31, 1910.

22

EXHIBIT "C."

United States Circuit Court, Southern District of New York.

Present:

Hon. E. Henry Lacombe, Circuit Judge;
Grand Jury for the Southern District of New York, quorum being present;
Henry A. Wise, U. S. Attorney for the Government;
Goldthwaite H. Dorr, Ass't U. S. Attorney;
Robert P. Stephenson, Ass't U. S. Attorney;
Christopher C. Wilson,
Cloyd Marshall,
Lucien C. Wallace.
Edward P. Davis.
Charles C. Galbraith.
Wm. H. Sargent.
Frederick I. J. Hanson.

Mr. WISE: If your Honor please, at the request and acting for the Grand Jury, I desire to make to this Court a Presentment against certain officers and directors of the United Wireless Telegraph Company, these persons have by direction of the Grand Jury come here direct from its room.

The facts briefly stated are these: For some time this Grand Jury has been investigating into alleged violations of section 5480 and 5440 of the Revised Statutes, as amended. Section 5440 is the conspiracy statute and Section 5480 is the use of the mails in a scheme to defraud. Christopher C. Wilson is the President of the United Wireless Telegraph Company and the other respondents who are here by direction of the Grand Jury, because they were witnesses before the Grand Jury, and the Grand Jury considered that they are in contempt, are all directors of the United Wireless Telegraph Company.

23 Now in the course of this investigation it had, in the opinion of the Grand Jury, become necessary that the Grand Jurors should have for their examination a book, or series of books, belonging to the United Wireless Telegraph Company.

The facts are that in the course of the business of the United Wireless Telegraph Company a press copy book or series of press-copy books has been kept by the Company in which copies of letters written by the President of the Company were preserved. Those letters, written by the President of the Company, were in respect of the business of the United Wireless Telegraph Company. The books were bought and paid for out of the funds of the company, and the title to the physical thing itself is in the Company, and not in any individual.

An examination of the by-laws of the United Wireless Telegraph Company shows that no officer or director of the United Wireless — Company has at any time been created the custodian of these books. The possession of the books, therefore, and the custody of these books is in the company.

The COURT: Of what State is it a corporation?

Mr. WISE: It is a Maine corporation.

The COURT: Do the Statutes of Maine contain a provision for the custody of the books in the absence of any provisions in the by-laws?

Mr. WISE: I think not.

The COURT: Then you come right down to the common law?

Mr. WISE: We come right down to the common law. Now those books were kept at 42 Broadway, which is the office of the Company, the office where its general business is transacted. It is a place where its President has offices, where the Secretary and
24 Treasurer have their offices and where you may say the General Offices of the Company are.

At about the time or shortly prior to the investigations by the Government into these alleged offences, the President of this Company removed these books from the 42 Broadway office and took them to his private home, and he has retained possession of them ever since.

Following the decision of your Honor in the American Sugar Refinery Company, the District Attorney has had subpœnas issued from the clerk's office directed to the United Wireless Telegraph Company commanding it to produce a particular press copy book containing letters for the month of May and June, 1909, and the proof is before this Grand Jury that there is such a book in existence, and that that book is now in the posses ion of this Christopher C. Wilson, the President of the Company, and I think I am safe in saying that the gentleman now is in Court with that book under his arm. But, whenever the United Wireless Telegraph Company has been called upon on subpœnas served upon it, and the service is made in the usual way, that is, by delivering a copy to an officer of the Company and exhibiting the original to him, and the subpœna in terms is addressed to the company, and not to any individual, and no one is called to testify, but simply the company to produce the book,
25 an officer or director of the United Wireless Telegraph Company invariably appears before the Grand Jury and says the Company answers the subpœna, but when the inquiry is made does the Company produce the book, Mr. Wilson invariably answers, I will produce it when I am sworn, and then he wants to offer a state-

ment raising some constitutional right of his own, that he has possession of the books and to give them up would tend to incriminate him.

Now the District Attorney at the instance of the Grand Jury has proceeded to serve the members of the Board of Directors of that Company with subpœnas addressed to the United Wireless Telegraph Company directing the production of these books, and the majority of the Board of Directors are now before the Court. Mr. Wilson, Mr. Galbraith, Mr. Marshall, Mr. Davis, Mr. Wallace, Mr. Hanson, and Mr. Sargent.

The COURT: A majority without Mr. Wilson?

Mr. WISE: A majority without Mr. Wilson. They have also been served with this subpœna; many of them have been before the Grand Jury frequently and know of the purpose of the Government to obtain this book, and nothing has been done by them. They have not produced the book, invariably Mr. Wilson is present with the book seeking to obtain immunity, if you please, by being compelled to give up this book. Now is a corporation——

26 The COURT: Have they passed a resolution calling the book back from Wilson?

Mr. WISE: They have done nothing.

The COURT: They should put the books where they ought to be, in the possession of the Secretary.

Mr. WISE: They have done nothing except having a meeting. Today they present this minute of a meeting of the Board of Directors as follows:

Meeting of the Board of Directors held at the office of the Company 42 Broadway, New York City, Tuesday, November 1st, 1910. There were present the following:

C. C. Galbraith, Cloyd Marshall, Frederick I. J. Hanson, William H. Sargent, E. P. Davis and L. C. Wallace.

Upon motion duly made, seconded and carried, it was

"Resolved, That the Board of Directors call upon C. C. Wilson and demand of him the possession of the letter-press copy books called for in the subpœna of October 31st, 1910, for the production of same before the Federal Grand Jury.

Meeting adjourned."

all of whom are here and all of whom have been subpœnaed. And it appears that today for the first time they adopted this resolution:

"Upon motion duly made, seconded and carried, it was

"Resolved, That the Board of Directors call upon C. C. Wilson and demand of him the possession of the letter-press copy books called for in the subpœna of October 31st, 1910, for the production of same before the Federal Grand Jury."

and I am told they have made this demand and that he has
27 failed to deliver up these books.

On these facts we ask the Court to make the proper direction in order that the process of this Court may be——

The COURT: How long have they been waiting before they made this demand?

Mr. WISE: Most of these men have known of the efforts of the Government to obtain this book for more than a month. We have been after this in one way or another before this same Grand Jury for nearly a month and this was the first time that they had done anything, and they do it here this morning at about the time when the Grand Jury is expected—no, I may say yesterday they were all day before the Grand Jury and appeared there and had done nothing at that time, and now we are met this morning after they are ordered to appear before this court, with this copy of the resolution of the Board of Directors.

The COURT: What is the presentment precisely?

Mr. WISE: The Grand Jury presents that the corporation is in contempt of this court in not obeying the subpœna, that these gentlemen are in contempt of Court in that they have known and had actual notice of the subpœnas issued to the corporation requiring it to produce these books, and in defiance of this court and of its process have failed to take any action to have their corporation comply with the process, and that the defendant Wilson is in contempt of this court in that, knowing of this process, he is obstructing and impeding and preventing the corporation from complying with the process.

The COURT: Now it appears they have demanded the books of Wilson and he has refused to give them up?

Mr. WISE: They have done that this morning, after they were in contempt yesterday.

Mr. SARGENT: May it please your Honor, I woud like to
28 make a statement here because it puts me in a position that I don't want.

The COURT: What is your name?

Mr. SARGENT: My name is William H. Sargent, and I was summoned here before the Grand Jury——

The COURT: Are you one of the directors?

Mr. SARGENT: Yes, sir, I am one of the directors. I was summoned here as a witness. After I came here as a witness, yesterday, they served this summons on me to produce the books. It was only a half hour or an hour before I was summoned to appear in Court. I had no time to produce the books; I haven't known anything about their wanting the books before yesterday at all, and this morning we met and proceeded in the way they have stated here, so that I am not in contempt of the Court. I have done everything in my power to obey the orders.

Mr. HANSON: Exactly the same thing with me.

The COURT: What is your name?

Mr. HANSON: Frederick I. J. Hanson, Philadelphia. I get a call for witness against C. C. Wilson. I thought it was private matters; I don't know anything about that trouble in the Company about producing a book, but I arrived yesterday at 10:30. That call was for. I was sent down to room 50 and Mr. Stephenson he took me over in the office and I was served with the notice to produce

the book. How a man living in Philadelphia can produce a book in five minutes, that is impossible I think. We did our duty right away; we went right together and called for a special meeting and we couldn't do it since this morning because we had hardly twelve hours' time to do it.

29 Mr. MARSHALL: Your Honor, Cloyd Marshall is my name, and I am Secretary of the Company, and a director. I should like to correct a statement which Mr. Wise made saying that we have done nothing. I have been served thirteen times to produce these letter books and I have responded in person every time. Now on two occasions we had called together all the directors in New York and where we could get them, half of our directors——

The COURT: Are they enough for a quorum?

Mr. MARSHALL: We have ten directors now and we had five at the meeting, and we passed resolutions calling for these books and Mr. Wilson to obey the subpœna. Our Executive Committee also met on two occasions and all during——

The COURT: I understand this last call made on Mr. Wilson was a call that was made by a majority of the Board of Directors, and Col. Wilson not one of the voters.

Mr. MARSHALL: That is correct. Now the Executive Committee has full authority to act for the Company in the absence of the directors, and we called a meeting of the Executive Committee on two occasions. The dates and all the details are in the possession of the Grand Jury and the Minutes. So that makes five meetings that we have held from time to time endeavoring to get Mr. Wilson to produce this book. Now he claims certain rights and declines to give it to us. Now in addition to these meetings we have searched for these books; we have looked for them back as far as July 1907 they called upon us.

30 The COURT: That was hardly necessary. You didn't know he had them?

Mr. MARSHALL: It was not known at first that he had them.

The COURT: There is no dispute now he has them?

Mr. MARSHALL: No sir, there is no question about it, but I want to show you that I as a director, and that the other directors, used due diligence and we made no effort of any kind to impede justice, and to show you that I have made no effort to impede justice I will say I have been before the Federal Grand Juries twenty-six times, and upon their subpœnas, and I have delivered thousands of documents and records in every single case in which they have called upon me to appear before them I have done so promptly in person and answered every question, and I have been a Government witness right straight along. I have done everything possible, more than they had a right to expect from me in the prosecution of this case, and it seems to me that in this instance that we cannot be held responsible for these things. Mr Wilson has gone before the Grand Jury with the book under his arm. Now the only way that I can get it from Mr. Wilson is to take it forcibly from him.

The COURT: The courts are open to you. The courts are open to the Board of Directors to get possession of their own property from

a person who has it in his custody and who keeps it in his own private room. There is no difficulty in law for a corporation getting its own books from the custody or the President.

31 Mr. MARSHALL: That is a question of fact that I think has not been decided, whether this book belongs to the Company or to Mr. Wilson.

The COURT: I understand the books are and the letters copied in them are letters of the company.

Mr. MARSHALL: He has private letters in there.

The COURT: That don't make any difference. He can tear the private letters out and return the corporation letters to the corporation.

I don't wish to hear much more from you gentlemen, because at last I see you have undertaken to do what you should do, that is, get possession of the books. It is up now to Mr. Wilson, and I would like to hear what his representative has to say.

Mr. WILSON: I have sent for our attorney and he will be here in a few moments. This is a case that went up on appeal before your Honor once before.

The COURT: How long? I haven't much time to wait.

Mr. WISE: I wish to show to the Court the attitude that these directors who are here have taken; this inquiry had gone on, and with the exception of the two gentlemen from out of town who had no knowledge of this thing I believe, after we had been trying to get these books this so called Board of Directors, or so many of them as were in New York, consisting of Wilson Galbraith, Marshall, Davis and Wallace, held a meeting at which they went through this performance: (reading).

32 "At a meeting of the Board of Directors held Monday October 17th, 1910, the following motion was made, duly seconded and carried:

"Whereas several members of the Board of Directors of the United Wireless Telegraph Company have been served with papers addressed to the U. W. T. Company and calling for the production before the United States Grand Jury of a letter-press copy book, or books, containing copies of letters and telegrams signed or purporting to be signed by the President of the Company, C. C. Wilson, and

"Whereas no such book or books, is in the possession of this Company and it is impossible for the Company to produce such book, or books, and

"Whereas We are informed that C. C. Wilson has been served with a paper calling for the production before the United States Grand Jury of the said book, or books, which paper is addressed to the U. W. T. Company:

"Now, therefore be it resolved, by the Board of Directors of the U. W. T. Company that the said C. C. Wilson be directed to produce the said book, or books, called for in the said paper, before the United States Grand Jury, in accordance with the——"

The COURT: Did Mr. Marshall vote for that resolution?

Mr. WISE: He don't appear to be one of the directors there, but he attested it. Yes, he voted for it. (reading continued):

33 "That Mr. Wilson be directed to produce the said book called for in said paper before the United States Grand Jury in accordance with said paper, and that he cause the same to be produced, and be it further

"Resolved, that a certified copy of this resolution be served on the said C. C. Wilson by the Secretary."

Mr. WISE: And this resolution was drafted and typewritten in the office of John B. Stanchfield, the Attorney for C. C. Wilson, and sent to the office of the Board of Directors for their use; a deliberate effort on the part of this man Wilson to inject himself between this Grand Jury and the evidence it is seeking.

Mr. GALBRAITH: Your Honor my name is Galbraith———

The COURT: One of the directors?

Mr. GALBRAITH: Yes sir. Yesterday was the first time I was directed to appear before the Grand Jury in regard to this book. I appeared before the Grand Jury with the rest of the directors and later in the day I called upon Mr. Wilson to produce the book, which he refused to do. I met this morning with the rest of the directors and passed this resolution. The District Attorney evidently did not understand that I had been there before.

The COURT: I don't need to hear anything more from the directors. I am inclined to give them an extension of time so that they can proceed in their efforts to possess themselves of this book, but I am inclined to think, and propose to commit Mr. Wilson for contempt and consign him to the custody of the Mashal

34 until he shall deliver the book to the corporation from which he took it. If you wish to review that matter habeas corpus will be opened to you I suppose, and we will adjourn the proceedings so far as the directors are concerned for two weeks. You can probably get it straightened out by that time, and I will say to you gentlemen, members of the Board of Directors, that you had better instruct your counsel to take such legal action as he may in the name of the corporation to repossess yourselves of the book which the President has taken from you.

Mr. HANSON: Mr. Judge, yesterday afternoon, after the meeting, in room 119, we went in the company's office to meet our president, Mr. C. C. Wilson. I made a demand for the book; he refused to deliver it. I asked him to show me the book and I know if it is the book which you are after. He showed to me the book and I looked at it. Well, that means the date only where you are all looking back from May to June through the book. Also I made a little notice, the first letter which was copied in the book is December 19th 1908 and the last letter in that book is June 13th, 1909. The book is here.

Mr. WISE: I take the liberty of suggesting in the presence of the Court these gentlemen being a majority of the Board of Directors can employ counsel other than counsel who is representing Mr. Wilson, and bring a replevin suit on behalf of the corporation.

The COURT: Why certainly; you can employ counsel and get back your property.

Mr. HANSON: Excuse me, Judge. I have no idea what they want only since five minutes yesterday.

35 The COURT: I understand that. There is no criticism in regard to you, or the gentlemen from Portland here at all. A fair criticism is to be made on your account; you have done what you are obliged to do and you have called on the President to return the book to the corporation from which he took it, and I am assuming that you will continue on and take such actions to repossess yourself of the property and I make the commitment of Mr. Wilson, the President, to the custody of the Marshal until he returns the book to the corporation.

Mr. WILSON: I would like to have my attorney here to handle this case for me.

The COURT: I can't wait all day. I know perfectly well your attorney will apply for habeas corpus and get you out. You will get the commitment first and we will review it afterwards. You lose no rights by being committed now. The matter can be worked out under habeas corpus.

(Endorsed:) U. S. Circuit Court, Southern District N. Y., Filed Nov. 4, 1910, John A. Shields, Clerk.

36 *Order.*

At a Stated Term of the United States Circuit Court for the Southern District of New York, Held at the U. S. Court House & Post Office Building, in said District, on November 1, 1910.

Present:

Hon. E. Henry Lacombe, Circuit Judge.

In the Matter of the Presentment for Contempt of Court of United Wireless Telegraph Company, Christopher C. Wilson, Cloyd Marshall, Charles C. Galbraith, Lucien C. Wallace, Edward P. Davis, William H. Sargent and Frederick I. J. Hanson.

The Grand Jury of the United States Circuit Court for the Southern District of New York, having presented that United Wireless Telegraph Company and Cloyd Marshall, Charles C. Galbraith, Lucien C. Wallace, Edward P. Davis, William H. Sargent and Frederick I. J. Hanson, directors of said company, are in contempt of Court for failure to obey a certain subpœna duly issued out of this Court, dated October 28, 1910, and served on said United Wireless Telegraph Company, calling for the production by said United Wireless Telegraph Company of letter press copy books of United Wireless Telegraph Company containing copies of letters and telegrams signed or purporting to be signed by the President of said Company, during the months of May and June, 1909; and that Christopher C. Wilson is in contempt of Court for knowingly and wilfully obstructing and preventing said United Wireless Telegraph Company and said Cloyd Marshall, Charles C. Galbraith, Lucien

C. Wallace, Edward P. Davis, William H. Sargent and
37 Frederick I. J. Hanson, directors thereof, from obedience to said subpœna, and for resisting said subpœna of this Court.

Now, after hearing the said presentment, and said United Wireless Telegraph Company, and said Christopher C. Wilson, Cloyd Marshall, Charles C. Galbraith, Lucien C. Wallace, Edward P. Davis, William H. Sargent and Frederick I. J. Hanson, directors thereof, having appeared to answer said presentment, and after hearing said United Wireless Telegraph Company and said Christopher C. Wilson, Cloyd Marshall, Charles C. Galbraith, Lucien C. Wallace, Edward P. Davis, William H. Sargent and Frederick I. J. Hanson, the directors thereof, it is hereby

Ordered and adjudged that Christopher C. Wilson is in contempt of this Court, as charged in said presentment, and

It is further ordered that said Christopher C. Wilson be committed to the custody of the United States Marshal for the Southern District of New York until he delivers to United Wireless Telegraph Company said books called for by said subpœna, and ceases to obstruct and impede the process of this Court, or otherwise purge himself of this contempt.

E. HENRY LACOMBE,
Circuit Judge.

(Endorsed:) U. S. Circuit Court, Southern District N. Y., Filed Nov. 1, 1910, John A. Shields, Clerk.

38 United States Circuit Court for the Southern District of New York.

In the Matter of the Application of CHRISTOPHER C. WILSON for a Writ of Habeas Corpus.

UNITED STATES OF AMERICA,
Southern District of New York,
City, County and State of New York, ss:

Christopher C. Wilson, being duly sworn, deposes and says: I am the petitioner herein. On or about August 3, 1910, the Grand Jury of the United States at a Term of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit, found two indictments against me and certain other defendants therein named, officers, directors and stockholders of the United Wireless Telegraph Company, which indictments were filed in this court August 3, 1910, and to which indictments on file in this Court I respectfully refer, and make a part of this affidavit, copies of which indictments are hereto annexed marked "Exhibits 2 and 3". One of the said indictments charges the defendants therein, including myself, officers directors and stockholders of said United Wireless Telegraph Company, with having, prior to July 3, 1909, devised a scheme to defraud by use of the mails by mak-

ing false representations with reference to the business and property of said United Wireless Telegraph Company. The other of said indictments charges the defendants therein, including myself,
39 officers, directors and stockholders of the United Wireless Telegraph Company, with having on October 1, 1907, conspired to commit offenses against the United States, by devising a scheme to obtain money and property by false pretenses to be effected by opening and intending to open correspondence and communication with various persons, by placing in a post office of the United States letters, circulars, pamphlets and other writings, making false representations with reference to the business and property of the said United Wireless Telegraph Company. The said two indictments are now pending and have not been brought to trial, but I have been arraigned and entered my pleas to the same, with leave to withdraw my pleas and demur or make such motions as I may see fit on or before November 8, 1910.

I claim and verily believe the production of the letter press copy book, as called for by the subpœna mentioned in the petition and return herein, and the matters in said letter press copy book contained, would tend to incriminate me, and that the production thereof would violate my rights and the privileges guaranteed to me by law, and that for these reasons I am not required by law and should not be compelled, directly or indirectly, to furnish or produce said letter press copy book, as called for by said subpœna, nor to testify in regard to the contents thereof, nor to permit the contents thereof to be used against me, and that compulsion should not be exercised upon me to this end by virtue of a subpœna addressed to the United Wireless Telegraph Company, or otherwise.

I now have said letter press copy book in my possession, but for the reasons hereinbefore stated I have declined to deliver it
40 to the Grand Jury, or to testify in regard to the contents thereof, but such declination and the above and foregoing objections have been made by me in good faith and without intending any disrespect to the Grand Jury or to the Court, and without any intention on my part to obstruct or in any manner interfere with the due administration of justice, but solely to protect my legal rights in the premises.

Said book was from about the time of its purchase used for copying letters and correspondence dictated and signed by me. Said book was about the middle of June 1910 taken by me to my home where it was at the time of the service on me of the first subpœna addressed to the corporation in relation to the production of said book, in or about the early part of October, 1910.

C. C. WILSON.

Sworn to before me this 9 day of November, 1910.

[SEAL.] FREDERICK D. CAMPBELL,
Notary Public.

Certificate filed in New York — Kings Co. *County.*

EXHIBITS 2 and 3.

41 *Indictment.*

(Copy Indictment Scheme to Defraud by Use of the Mails.)

Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

UNITED STATES
vs.
CHRISTOPHER C. WILSON et al.

At a Stated Term of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit, begun and held in the City of New York, within and for the District and Circuit aforesaid, on the first Monday of July, in the year of our Lord one thousand nine hundred and ten, and continued by adjournment to and including the third day of August, in the year of our Lord one thousand nine hundred and ten.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

The Jurors of the United States of America within and for the District and Circuit aforesaid, on their oath present that
42 Christopher C. Wilson, Samuel S. Bogart, William W. Tompkins, George H. Parker, Francis X. Butler, Charles C. Galbraith and William A. Diboll, officers, directors and stockholders of the United Wireless Telegraph Company, a corporation organized under the laws of the State of Maine, and named as defendants herein, late of the City and County of New York, in the District and Circuit aforesaid, yeoman, heretofore, to wit, on the third day of July, in the year of our Lord one thousand nine hunderd and nine, at the Southern District of New York, and within the jurisdiction of this Court, having theretofore devised and intended to devise, a scheme and artifice to defraud one Asa S. Couch, in and by the name of Osa S. Couch, and divers other persons to the jurors unknown, that is to say, to obtain from them and each of them their moneys and property by false pretenses, and to induce the said Asa S. Couch and said other persons to send to them the said defendants in and by the name of the United Wireless Telegraph Company, such moneys and property with the intent on the part of the said defendants to convert the same to their own use in and by falsely and fraudulently pretending that the purpose of the organization of the said United Wireless Telegraph Company was to consolidate the two great wireless telegraph companies, namely, the American De Forest Wireless Telegraph Company and the Marconi Wireless Telegraph Company, and by taking over all wireless telegraph companies or wireless inventions that might or could in any way come in competition with the said United Wireless Telegraph Company; and it was their general purpose to represent to the said

Asa S. Couch and the said divers other persons that the practical operation of wireless telegraphy by said United Wireless
43 Telegraph Company was yielding large net profits over and above operating expenses, and that the said company practically had a monoply of the wireless business of the continent of North America, and on account thereof the stock of said United Wireless Telegraph Company had high commercial value; and that the said company was free from debt, except current expenses, and had ample funds on hand to pay dividends on the stock issued and to extend and enlarge its commercial business; and that the officers and directors of the said company were not dispo-ing of their personal stock in the said company, but that the sales were only of treasury stock of the same.

Whereas, in truth and in fact, there was not a consolidation of the said wireless telegraph companies; that is to say, the American De Forest Wireless Telegraph Company and the said Marconi Wireless Telegraph Company, and the same was never undertaken by the said defendants and it was never intended by them that the same should be undertaken or accomplished, and it was never intended by them that the said United Wireless Telegraph Company should take over all wireless telegraph companies or inventions that might or could come in competition with the said United Wireless Telegraph Company; and it was untrue, as said defendants then and there well knew, that the practical operation of wireless telegraphy by said United Wireless Telegraph Company was yielding large net profits over and above operating expenses, and that said company had a monoply of the wireless business of the continent of North America, and that by reason thereof the stock of said United Wireless Telegraph Company had high commercial value; and it was untrue, as said defendants then and there well knew, that the
44 said company was free from debt except current expenses and had ample funds to pay dividends on the stock issued by said company and to extend and enlarge its commercial business; and it was likewise untrue, as said defendants then and there well knew, that the officers, directors and stockholders of the said United Wireless Telegraph Company, that is to say, the said defendants, were not disposing of their personal stock in said company, and that the sales of the stock of said company were confined to the treasury stock of the same, and indeed and in truth it was a part of the scheme and artifice of said defendants to sell their personal stock in said company, as well as the treasury stock thereof, pretending the same to be treasury stock.

And it was part of said scheme and artifice of said defendants to represent to the said persons intended to be deceived thereby, that the said United Wireless Telegraph Company was a consolidation of the said American De Forest Wireless Telegraph Company and the Marconi Wireless Telegraph Company in their systems of wireless telegraphy and that the said United Wireless Telegraph Company owned a controlling interest in the said Marconi Wireless Telegraph Company. But in truth and in fact the foregoing last-named

representations would be utterly untrue in every respect as the said defendants then and there well knew.

And it was also a part of the said scheme and artifice of the said defendants to represent to the said persons intended to be deceived thereby, that the said United Wireless Telegraph Company had an income sufficient in the year nineteen hunderd and seven to pay seven per cent. dividends on their preferred stock and to take care of all the expenses of the said company and leave a
45 surplus; all of which would be utterly untrue as the said defendants then and there well knew.

And it was also a part of the said scheme and artifice of the said defendants to represent to the said persons intended to be deceived thereby, that the said United Wireless Telegraph Company had and was continually acquiring large stock interests in the said Marconi Wireless Telegraph Company, all of which would be untrue as the defendants then and there well knew.

And it was a part of the said scheme and artifice of the said defendants to represent to the said persons intended to be deceived and influenced thereby, that stock of said United Wireless Telegraph Company was being exchanged for stock or bonds of the said American De Forest Wireless Telegraph Company, and that such exchanged stock would be non-negotiable and non-transferable for two years and so marked and stamped; and that by reason of making such stock non-transferable for two years as aforesaid, there would be no such stock on the market except the treasury stock of the said United Wireless Telegraph Company; thereby enabling said company to expand its business and put the same on a continuous dividend-paying basis; whereas it was a part of said scheme and artifice of said defendants to place upon the market and sell and transfer certain of their own personal stock in said United Wireless Telegraph Company, which they had theretofore received from said company in exchange for the stock and bonds of the American De Forest Wireless Telegraph Company, during said period within which they intended to represent said stock of said United Wireless Telegraph Company to be non-negotiable and non-transferable.

That it was a part of the said scheme and artifice of the
46 said defendants to represent to the persons intended to be influenced and deceived that the said United Wireless Telegraph Company included among its assets, stocks and bonds of other wireless telegraph companies of the value of not less than $12,000,000 but the said stocks and bonds had no market value and indeed were worthless, as the said defendants then and there well knew.

And it was a part of the said scheme and artifice of the said defendants to represent to said persons intended to be influenced and deceived thereby that all the stock of the said United Wireless Telegraph Company held by the officers and directors thereof was purchased and paid for the same as by the other stockholders; which said representations would be untrue, as said defendants then and there well knew.

And it was a part of the said scheme and artifice of the said defendants to falsely and fraudulently represent to the said persons

intended to be influenced and deceived thereby, that the stock of the said United Wireless Telegraph Company owned and held by the officers and directors thereof, was made non-negotiable for two years, making it impossible for the said stock to be sold in competition with the treasury stock of said company; whereas it was a part of said scheme and artifice of said defendants to sell and transfer said stock so held in competition with said treasury stock during the period it was so stated to be non-negotiable.

And it was a part of the said scheme and artifice of the said defendants to represent to the said persons intended to be influenced and deceived thereby, that in the year nineteen hundred and nine every officer and director of the said United Wireless Telegraph

Company had his stock therein tied up and made non-trans-
47 ferable so that it could not be sold for two years, and that the said officers and directors could not make any money out of their investments except to cause the said company to pay dividends, but the said representations would be untrue, as the said defendants then and there well knew.

And it was a part of the said scheme and artifice of the said defendants to represent to the said persons intended to be influenced and deceived, that the said United Wireless Telegraph Company was earning a profit over and above operating expenses, and that the said profit was increasing rapidly each month, and that the United Wireless Telegraph Company was an established enterprise conducted at a profit; but the said statements would be false as the said defendants then and there well knew.

And it was a part of the scheme and artifice of the said defendants to represent to the said persons intended to be influenced and deceived thereby, that in the month of May, nineteen hundred and nine, the said United Wireless Telegraph Company had an income sufficient to meet all expenses and salaries and to pay dividends, but the said representations would be false, as the said defendants then and there well knew.

And it was a part of the scheme and artifice of the defendants to represent to the said persons whom it was intended to influence and deceive, said that in the year nineteen hundred and eight, the said United Wireless Telegraph Company made a net gain of over Five million dollars, which was a profit of over twenty-six per cent. of the capital stock and thirty-five per cent. on the amount of stock issued; but the said representations would be untrue, as the said

defendants then and there well knew.

48 And it was a part of the scheme and artifice of the said defendants to represent to the said persons intended to be influenced and deceived thereby, that during the year nineteen hundred and eight, the income and earning power of the said United Wireless Telegraph Company had increased to the amount of three hundred per cent., but the said statement would be utterly untrue, as the defendants then and there well knew.

And it was a part of the scheme and artifice of the said defendants to represent to the persons intended to be influenced and deceived thereby, that in the second year of doing business the said United

Wireless Telegraph Company was in a position to pay a handsome dividend, but the said statement would be utterly false, as the said defendants then and there well knew.

And it was a part of the scheme and artifice of the said defendants to represent to the said persons intended to be influenced and deceived thereby, that an advance in the price of stock of the said United Wireless Telegraph Company was made only as increased assets and earnings of the said company warranted the same; but the said statement would be utterly untrue, as the defendants then and there well knew.

And it was a part of the scheme and artifice of the said defendants to represent to the said persons intended to be influenced and deceived thereby, that in the month of April, nineteen hundred and nine, the said United Wireless Telegraph Company was firmly established on a profit earning basis obtained from the operation of its extensive commercial system on such date was earning profits from the operation of its said commercial business; but the said representations would be untrue, as the defendants then and there well knew.

49 And it was a part of the scheme and artifice of the said defendants to represent to the said persons intended to be influenced and deceived thereby, that the treasury of the said company was, in the said month of April, nineteen hundred and nine, well supplied with cash to carry on its business, which representation would be false, as the said defendants then and there well knew.

And it was a part of the scheme and artifice of the said defendants to represent to the said persons intended to be influenced and deceived thereby, that the United Wireless Telegraph Company in the months of April and May, in the year of our Lord nineteen hundred and nine, was firmly established on a profit earning basis obtained from its operations of its extensive commercial system, and its assets were estimated to be worth many millions of dollars in excess of its authorized capital stock, and that the treasury of said company was well supplied with cash to carry on its business; whereas the said representations would be in all respects utterly untrue, as the said defendants then and there well knew.

And it was a part of the scheme and artifice of the said defendants to represent to said persons intended to be deceived thereby, that in the third year, that is to say, in the year nineteen hundred and nine, of its existence, the said United Wireless Telegraph Company had an income approximating One million dollars a year; but the said representation would be untrue, as the said defendants then and there well knew.

And was a part of the said scheme and artifice of the said defendants to represent to such persons intended to be influenced and deceived thereby, that the value of the stock of the said United Wireless Telegraph Company had increased two hundred per

50 cent, within the months of May, nineteen hundred and eight and May, nineteen hundred and nine, but the said

statement would be then and there absolutely untrue, as defendants well knew.

And it was a part of the said scheme and artifice of the said defendants to represent to said persons intended to be influenced and deceived thereby, that from the month of July, nineteen hundred and eight, until the month of July, nineteen hundred and nine, the value of the stock of the said United Wireless Telegraph Company had increased four hundred per cent., but the said representation would be false, as the said defendants then and there well knew.

And it was a part of said scheme and artifice of the said defendants to advance the selling prices of the stock of said company from time to time on the false and fraudulent representation that said advances were due to the extension of the commercial business of said company and the profits arising therefrom, but in truth and in fact said advances were to be made arbitrarily by said defendants without foundation for the purpose of selling said stock at an unwarranted price, and thereby deceiving said persons above mentioned as to the value thereof and realizing larger profits from sales.

And the plan and purpose of the said defendants in their scheme and artifice to obtain money and property as aforesaid by false pretenses as hereinbefore mentioned and set forth, was to mislead and deceive the said Asa S. Couch and the said divers other persons hereinbefore named and to induce them and each of them to purchase the stock of the said United Wireless Telegraph Company as aforesaid.

And the said scheme and artifice the said defendants in-
51 tended to effect by opening and intending to open correspondence and communication with the said Asa S. Couch and said other persons to the jurors unknown and intended to be defrauded thereby by means of the Post Office Establishment of the United States and by inciting such other persons to open such communication with them, the said defendants, so devising and intending.

And the said defendants, on the said third day of July, in the year of our Lord, one thousand nine hundred and nine, at and in the District aforesaid, in and for executing the said scheme and attemptin- so to do, unlawfully and wilfully placed and caused to be placed in the post office of the United States at Station "P" in the said City and County, a certain sealed envelope, then and there addressed and directed as follows, that is to say:

"Dr. Osa S. Couch,
60 Green St.,
Fredonia, N. Y.;

and upon the said envelope in the upper left-hand corner thereof, appeared the following words and figures, that is to say:

New York Selling Agency, Inc.
18 Broadway,
New York;

and contained within the said envelope, then and there, was a circular letter with the heading of the said Selling Agency as follows:

Telephone 4574 Broad.

52 New York Selling Agency
Incorporated.
Investment Securities.
18 Broadway, New York.
Fiscal Agents.
United Wireless Telegraph Company.

and dated "New York, July 3, 1909," the same circular letter then and there being addressed as follows:

Dr. Osa S. Couch, Fredonia, N. Y.

DEAR SIR:—

and the said circular letter, then and there, was signed as follows, that is to say:

Yours very truly,
NEW YORK SELLING AGENCY, INC.
W. W. TOMPKINS, *President.*

Against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided.

Second Count.

And the jurors aforesaid, on their oaths aforesaid, do further present that Christopher C. Wilson, Samuel S. Bogart, William W. Tompkins, George H. Parker, Francis X. Butler, Charles C. Galbraith and William A. Diboll, officers, directors and stockholders of the United Wireless Telegraph Company, a corporation organized under the laws of the State of Maine and named as defendants
53 herein, late of the City and County of New York in the District and Circuit aforesaid, yeomen, heretofore, to wit, on the third day of August, in the year of our Lord one thousand nine hundred and nine, at the Southern District of New York and within the jurisdiction of this Court, having theretofore devised and in-

tended to devise, a scheme and artifice to defraud one C. F. Williams and divers other persons to the jurors unknown, to obtain from them and each of them their money and property by false pretenses; and this count, that is to say, the second count, of this indictment, from and after the words "false pretenses" on page two in the first count of the same, to and including the words "to induce them and each of them to purchase the stock of the said United Wireless Telegraph Company as aforesaid," set forth in the said first count, on page nine thereof, is in all respects like the said first count in its allegations, saving and excepting that the name C. F. Williams is substituted in this count for the name "Asa S. Couch" wherever it occurs in the said first count; and the said first count within the limits aforesaid is herewith repeated and incorporated in this second count.

And the said scheme and artifice the said defendants intend to effect by opening and intending to open correspondence and communication with the said C. F. Williams and said other persons to the jurors unknown and intended to be affected thereby, by means of the Post Office Establishment of the United States and by inciting such other persons to open such communication with them, the said defendants, so devising and intending.

And the said defendants, on the third day of August in the year of our Lord one thousand nine hundred and nine, at and in the District aforesaid, in and for executing the said scheme and artifice
54 and attempting so to do, unlawfully and willfully placed and caused to be placed in the post office of the United States at Station "P" in the said City and County, a certain sealed envelope, then and there addressed and directed as follows, that is to say:

C. F. Williams,
25 Blymer Ave.,
Mansfield, Ohio;

and upon the said envelope, in the upper left-hand corner thereof, appeared the following words and figures, that is to say:

New York Selling Agency, Inc.
18 Broadway,
New York;

and contained within the said envelope, then and there, was a circular letter with the heading of the said Selling Agency as follows:

Telephone- 5887, 5788 Broad.
Cable "Nyselage New York."

New York Selling Agency
Incorporated
Investment Securities
18 Broadway, New York.
Fiscal Agents
United Wireless Telegraph Company.

and dated "New York, Aug. 3, 1909," the same circular then and there being addressd as follows:

55 Mr. C. F. Williams, Mansfield, O.

DEAR SIR:—

and the said circular letter then and there was signed as follows, that is to say:

Yours very truly,
NEW YORK SELLING AGENCY, INC.
W. W. TOMPKINS, *President.*

Against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided.

Third Count.

And the jurors aforesaid, on their oaths aforesaid, do further present that Christopher C. Wilson, Samuel S. Bogart, William W. Tompkins, George H. Parker, Francis X. Butler, Charles C. Galbraith and William A. Diboll, officers, directors and stockholders of the United Wireless Telegraph Company, a corporation organized under the laws of the State of Maine and named as defendants herein, late of the City and County of New York, in the District and Circuit aforesaid, yeoman, heretofore, to wit, on the twenty-ninth day of September, in the year of our Lord one thousand nine hundred and nine, at the Southern District of New York and within the jurisdiction of this Court, having theretofore devised and intended to devise, a scheme and artifice to defraud one Rev. W. Elmer Bailey and divers other persons to the jurors unknown, to obtain from them and each of them their money and property by false pretenses;

and this count, that is to say, the third count, of this indict-
56 ment, from and after the words "false pretenses" on page two in the first count of the same, to and including the words "to induce them and each of them to purchase the stock of the said United Wireless Telegraph Company as aforesaid," set forth in the said first count on page nine thereof, is in all respects like the first count in its allegations, saving and excepting that the name Rev. W. Elmer Bailey is substituted in this count for the name "Asa S Couch" wherever it occurs in the said first count; and the said first count within the limits aforesaid is herewith repeated and incorporated in this third count.

And the said scheme and artifice the said defendants intended to effect by opening and intending to open correspondence and communication with the said Rev. W. Elmer Bailey and said other persons to the jurors unknown and intended to be affected thereby, by means of the Post Office Establishment of the United States and by inciting such other persons to open such communication with them, the said defendants, so devising and intending.

And the said defendants, on the twenty-ninth day of September, in the year of our Lord one thousand nine hundred and nine, at and in the District aforesaid, in and for executing the said scheme and artifice and attempting so to do, unlawfully and wilfully placed and

caused to be placed in the Post Office of the United States at Station "P" in the said City and County, a certain sealed envelope, then and there addressed and directed as follows, that is to say:

Rev. W. Elmer Bailey,
408 West St.,
Findlay, Ohio,

and upon the said envelope, in the upper left-hand corner
57 thereof, appeared the following words and figures, that is to say:

New York Selling Agency, Inc.,
18 Broadway,
New York;

and contained within the said envelope, then and there, was a circular letter with a heading of the said Selling Agency, as follows:

Telephone- 5887, 5788 Broad.
Cable "Nyselage New York."

New York Selling Agency
Incorporated
Investment Securities
18 Broadway, New York.
Fiscal Agents
United Wireless Telegraph Company

and dated "Sept. 29, 1909," the same circular letter then and there being addressed as follows:

Rev. W. Elmer Bailey.
DEAR SIR:—

and the said circular letter then and there was signed as follows, that is to say:

Yours truly.
NEW YORK SELLING AGENCY, INC.
W. W. TOMPKINS, *President.*

Against the peace of the United States and their dignity
58 and contrary to the form of the statute of the United States in such case made and provided.

HENRY A. WISE,
United States Attorney.

(Endorsed:) U. S. Circuit Court.—The United States of America vs. Christopher C. Wilson, Samuel S. Bogart, William W. Tompkins, George H. Packer, Francis X. Butler, Charles C. Galbraith and William A. Diboll.—Indictment—Scheme to defraud by use

of the mails. U. S. Rev. Stat., Sec. 5480 as amended.—Henry A. Wise, U. S. Attorney.— A True Bill, Edward C. Burgess, Foreman.— U. S. Circuit Court, Southern District N. Y. Filed Aug. 3, 1910.— John A. Shields, Clerk.

1910.
Aug., 3. Wilson pleads Not Guilty with leave to withdraw Sept. 20, Bail $25,000
3. Bogart pleads Not Guilty with leave to withdraw Sept. 20, Bail $10,000
3. Tompkins pleads Not Guilty with leave to withdraw Sept. 20, Bail $10,000
3. Butler pleads Not Guilty with leave to withdraw Sept. 20, Bail $5,000
3. Galbraith pleads Not Guilty with leave to withdraw Sept. 20, Bail $5,000
3. Diboll pleads Not Guilty with leave to withdraw Sept. 20, Bail $5,000

59 *Indictment.*

(Copy Indictment Scheme to Defraud by Use of the Mails.)

Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

UNITED STATES
vs.
CHRISTOPHER C. WILSON et al.

At a Stated Term of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit, begun and held in the City of New York, within and for the District and Circuit aforesaid, on the first Monday of July, in the year of our Lord one thousand nine hundred and ten, and continued by adjournment to and including the third day of August, in the year of our Lord one thousand nine hundred and ten.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

The Jurors of the United States of America within and for the District and Circuit aforesaid, on their oath present that Christopher C. Wilson, Samuel S. Bogart, William W. Tompkins, George H. Parker, Francis X. Butler, Charles C. Galbraith and William
60 A. Diboll, officers, directors and stockholders of the United Wireless Telegraph Company, a corporation organized under the laws of the State of Maine, named herein as defendants and conspirators, and divers other persons to the jurors unknown, late of the City and County of New York, in the District and Circuit aforesaid, yeomen, heretofore, to wit, on the first day of October, in the year of our Lord one thousand nine hundred and seven, at the Southern District of New York and within the jurisdiction of this

Court, unlawfully and willfully did conspire together to commit offences against the United States, in and by devising and intending to devise a scheme and ratifice to obtain money and property by false pretenses from one Asa S. Couch, Lillian D. Chase, Roy Gilbert, W. C. Broeker, C. F. Williams, W. Elmer Bailey, and divers other persons to the Grand Jurors unknown, to be effected by opening and intending to open correspondence and communication with the said Asa S. Couch, Lillian D. Chase, Roy Gilbert, W. C. Broeker, C. F. Williams, W. Elmer Bailey and the said divers other persons to the Grand Jurors unknown, by means of the Post Office Establishment of the United States, and by inciting said Asa S. Couch, Lillian D. Chase, Roy Gilbert, W. C. Broeker, C. F. Williams, W. Elmer Bailey and said divers other persons to open communication with them, the said defendants, so devising and intending; and it was a part of the said conspiracy to execute the said scheme and artifice, and to attempt so to do by placing and causing to be placed in a Post Office of the United States, letters, circulars, pamphlets and other writings to be sent and delivered by the said Post Office Establishment to said persons intended to be affected by said conspiracy.

61 And it was a part of the said scheme and artifice which said defendants so conspired to devise and execute to induce the said Asa S. Couch, Lillian D. Chase, Roy D. Gilbert, W. C. Broeker, C. F. Williams, W. Elmer Bailey and said divers other persons to send to them, the said defendants, in and by the name of the United Wireless Telegraph Company, said moneys and property with intent on the part of the said defendants to convert the same to their own use, in and by falsely and fraudulently representing and pretending that the purpose of the organization of the said United Wireless Telegraph Company was to consolidate the two great wireless telegraph companies, namely American De Forest Wireless Telegraph Company and the Marconi Wireless Telegraph Company, and by taking over all wireless telegraph companies and wireless inventions that might or could in any way come in competition with the said United Wireless Telegraph Company; that the practical operation of wireless telegraphy by the said United Wireless Telegraph Company was yielding large net profits over and above operating expenses, and that the said company practically had a monopoly of the wireless business of the Continent of North America, and by reason thereof its stock had a high commercial value; and that the said company was free from debt except current expenses and had ample funds on hand to pay dividends on the stock issued and to extend and enlarge its commercial business; and that the officers and directors of the said company were not disposing of their personal stock in the said company, but that the sales of the stock of said company were only of the treasury stock of the same.

62 And it was a part of the said conspiracy and of the said scheme and artifice of the said defendants to represent to the said persons intended to be deceived thereby that the said United Wireless Telegraph Company was a consolidation of the said American De Forest Wireless Telegraph Company and the Marconi

Wireless Telegraph Company in their systems of wireless telegraphy and that the said United Wireless Telegraph Company owned a controlling interest in the said Marconi Wireless Telegraph Company, whereas in truth and in fact said representations would be utterly false in every respect, as the said defendants then and there well knew.

And it was also a part of the said conspiracy and of the said scheme and artifice of the said defendants to represent to the said persons intended to be deceived thereby that the said United Wireless Telegraph Company had an income sufficient in the year nineteen hundred and seven to pay seven per cent. dividends on their preferred stock and to take care of all the expenses of the said company and still to leave a surplus; all of which representations would be utterly untrue, as the said defendants then and there well knew.

And it was also a part of the said conspiracy and of the scheme and artifice of the said defendants to represent to the said persons intended to be deceived thereby, that the said United Wireless Telegraph Company had and was continually acquiring large stock interests in the said Marconi Wireless Telegraph Company, whereas said representation would be untrue, as the defendants then and there well knew.

And it was a part of the said conspiracy and of the said scheme and artifice of the said defendants to represent to the said persons intended to be deceived and influenced thereby, that all stock
63 exchanged by the said United Wireless Telegraph Company for stock or bonds of the said American De Forest Wireless Telegraph Company would be non-negotiable and non-transferable for two years, and was so marked and stamped; and that by reason of making such stock non-transferable for two years, as aforesaid, there would be no such stock on the market except the treasury stock of the said United Wireless Telegraph Company, thereby enabling said company to extend its business and put the same on a continuous dividend paying basis, whereas it was a part of said scheme and artifice which said defendants so conspired to devise and execute that said defendants would place on the market, sell and transfer stock of said United Wireless Telegraph Company owned by them and obtained by them from said company by exchange for stocks and bonds of the American De Forest Wireless Telegraph Company and would so sell and transfer said stock owned by them during the period within which they would so represent said stock to be non-negotiable and non-transferable.

That it was a part of the said conspiracy and of the said scheme and artifice of the said defendants to represent to said persons intended to be influenced and deceived thereby that the said United Wireless Telegraph Company included among its assets stocks and bonds of other wireless telegraph companies of the value of not less than twelve million dollars, whereas in fact the said stocks and bonds of other wireless telegraph companies owned by said United Wireless Telegraph Company had no market value and indeed were worthless, as the said defendants then and there well knew.

64 And it was a part of the said conspiracy and of the said scheme and artifice of the said defendants to falsely and fraudulently represent to the said persons intended to be influenced and deceived thereby that the stock held by the officers and directors of the said United Wireless Telegraph Company was made non-negotiable for two years, making it possible for the said stock to be sold in competition with the treasury stock of the said company, whereas it was part of said scheme and artifice and said conspiracy that said defendants should sell and transfer certain shares of said stock owned by them within the period during which said shares of said stock would be so represented to be non-negotiable and non-transferable.

And it was a part of the said conspiracy and of the said scheme and artifice of the said defendants to falsely and fraudulently represent to the said persons intended to be influenced and deceived thereby, that the said United Wireless Telegraph Company was earning a profit over and above operating expenses and that the said profit was increasing rapidly each month, and that the said United Wireless Telegraph Company was an established enterprise conducted at a profit, with income sufficient to meet all expenses and pay dividends, and that the treasury was well supplied with cash.

And it was a part of the said conspiracy and of the said scheme and artifice of the said defendants to represent to the said persons intended to be influenced and deceived thereby, that in the year nineteen hundred and eight the said United Wireless Telegraph Company made a net gain of over five million dollars, which was a profit of over twenty-six per cent. on the capital stock and thirty-five per cent. on the amount of stock issued; which said repre-

65 sentations would be false and untrue, as the said defendants then and there well knew.

And it was a part of the said conspiracy and of the said scheme and artifice of the said defendants to represent to the said persons intended to be influenced and deceived thereby, that during the year nineteen hundred and eight the income and earning power of the United Wireless Telegraph Company had increased to the amount of three hundred per cent.; but the said representations would be utterly false, as the defendants then and there well knew.

And it was a part of the said conspiracy and of the said scheme and artifice of the said defendants to represent to the said persons intended to be influenced and deceived thereby, that in the second year of doing business the said United Wireless Telegraph Company was in a position to pay a handsome dividend; but as the said defendants then and there well knew, the said representation would be utterly false and untrue.

And it was a part of said conspiracy and of the said scheme and artifice of the said defendants to represent to the said above named persons intended to be influenced and deceived thereby, that an advance in the price of stock of the said United Wireless Telegraph Company was made only as increased assets and earnings of the said company warranted the same; but the said representation would be untrue, as the defendants then and there well knew.

And it was a part of the said conspiracy and of the said scheme and artifice of the said defendants to falsely and fraudulently represent to the persons intended to be influenced and deceived thereby, that the value of the stock of the said United Wireless Telegraph Company had doubled and quadrupled within periods of a year in length.

66 And it was a part of the said conspiracy and of the scheme and artifice of the said conspirators to advance the sale prices of the stock of the said United Wireless Telegraph Company from time to time and to represent to the said persons intended to be deceived and misled thereby that the said advances were due to the expansion of the commercial business of the said company and the profits arising therefrom; but in truth and in fact it was the plan of said defendants to make said advances arbitrarily without foundation, for the purpose of selling said stock at an unwarranted price, thereby deceiving the said persons intended to be misled and deceived thereby as to the value of such stock, and to realize larger profits for themselves from said sales.

And it was the plan and purpose of the said conspirators, the defendants above named in their scheme and artifice to obtain money and property as aforesaid, by false pretenses, as hereinbefore mentioned and set forth; and to mislead and deceive the said Asa S. Couch, Lillian D. Chase, Roy Gilbert, W. C. Broeker, C. F. Williams, W. Elmer Bailey, and the said divers other persons hereinbefore mentioned, and to induce them and each of them to purchase stock of the said United Wireless Telegraph Company as aforesaid.

And to effect the object of the said conspiracy the said Christopher C. Wilson, on the thirty-first day of December, in the year of our Lord one thousand nine hundred and eight, deposited and caused to be deposited in the Post Office in said District, City and County, at the Hudson Terminal Station, a sealed letter signed by him in the name of C. C. Wilson, president, addressed to

67 "Mrs. Lillian D. Chase,
295 Essex Street,
Bangor, Maine."

And further to effect the object of said conspiracy, the said George H. Parker, on the twenty-seventh day of March, in the year of our Lord one thousand nine hundred and nine, deposited and caused to be deposited in a Post Office of the United States at Seattle, Washington, a certain letter addressed and directed to

"Mr. Roy Gilbert,
601 W. 4th St.,
Owensboro, Ky."

and signed by him in the name of "Geo. H. Parker."

And further to effect the object of the said conspiracy the said Samuel S. Bogart, on the twentieth day of April, in the year of our Lord one thousand nine hundred and nine, deposited and caused to

be deposited in the Post Office of the United States in the said City and County of New York, Southern District of New York, a certain letter addressed to

"Mr. W. C. Broeker,
Owensboro, Ky."

the said letter being signed in the name of S. S. Bogart, Vice-President of the United Wireless Telegraph Company.

And further to effect the object of the said conspiracy the said William W. Tompkins, on the third day of July, in the year
68 of our Lord one thousand nine hundred and nine, deposited and caused to be deposited in branch Post Office "P" in the said City and County of New York, Southern District of New York, a certain letter addressed to

"Dr. Osa S. Couch,
60 Green St.,
Fredonia, N. Y."

And further to effect the object of said conspiracy the said William W. Tompkins, on the third day of August, in the year of our Lord one thousand nine hundred and nine, deposited and caused to be deposited in a Post Office of the United States at Station "P," in the said City and County of New York, Southern District of New York, a letter addressed to

"C. F. Williams,
25 Blymer Ave.,
Mansfield, Ohio."

the said letter then and there purporting to be from the New York Selling Agency, 18 Broadway, New York, and purporting to be signed in and by the name of W. W. Tompkins, President.

And further to effect the object of the said conspiracy the said William W. Tompkins, on the twenty-ninth day of September, in the year of our Lord one thousand nine hundred and nine, deposited and caused to be deposited in the branch Post Office at Station "P" in said City and County of New York, Southern District of New York, a certain letter addressed to

"Rev. W. Elmer Bailey,
408 West St.,
Findlay, Ohio."

69 the said letter purporting to be signed

"Yours truly,
NEW YORK SELLING AGENCY, INC.
W. W. THOMPKINS, *President*";

against the peace of the United States and their dignity, and contrary to the form of the statute of the United States in such case made and provided.

HENRY A. WISE,
United States Attorney.

(Endorsed:) U. S. Circuit Court.—The United States of America vs. Christopher C. Wilson, Samuel S. Bogart, William A. Tompkins, George H. Parker, Francis X. Butler, Charles C. Galbraith and William A. Diboll.—Indictment.—Conspiracy to commit an offense against the United States.—U. S. Rev. Stat., Sec. 5440.—Henry A. Wise, U. S. Attorney.—A True Bill, Edward C. Burgess, Foreman.—U. S. Circuit Court, Southern District N. Y.—Filed Aug. 3, 1910.—John A. Shields, Clerk.

1910. Aug. 3. Defendants Wilson, Bogart, Tompkins, Butler, Galbraith and Diboll plead not guilty with leave to withdraw Sept. 20, 1910.

70 (Endorsed:) Due, timely and proper service of a copy of the within affidavit is hereby admitted this 9th day of November, 1910. Henry A. Wise, Attorney for U. S.—U. S. Circuit Court, Southern District N. Y., Filed Nov. 9, 1910, John A. Shields, Clerk.

71 *Order Dismissing Writ of Habeas Corpus.*

At a Stated Term of the United States Circuit Court for the Southern District of New York, held at the U. S. Court House and Post Office Building, in said District on November 9th, 1910.

Present:

Honorable E. Henry Lacombe, Circuit Judge.

In the Matter of the Presentment for Contempt of Court of United Wireless Telegraph Company, Christopher C. Wilson, Cloyd Marshall, Charles C. Galbraith, Lucien C. Wallace, Edward P. Davis, William H. Sargent and Frederick I. J. Hanson.

Upon reading the writ of habeas corpus herein, dated November 1st, 1910, and allowed by the Honorable Alfred C. Coxe, United States Circuit Judge, and the return to said writ of habeas corpus signed by William Henkel, United States Marshal for the Southern District of New York, and the affidavit of Christopher C. Wilson duly verified on November 9th, 1910, and after hearing John B. Stanchfield, Esq., attorney for Christopher C. Wilson, in support of said writ of habeas corpus, and Henry A. Wise, Esq., United States Attorney for the Southern District of New York, in opposition thereto, it is hereby

Ordered that said writ of habeas corpus be and the same hereby is dismissed and the relator, Christopher C. Wilson, remanded to the

custody of William Henkel, United States Marshal for the Southern District of New York, to be detained by said Marshal in accordance with the order of this court, dated November 1st, 1910, and it is

72 Further ordered that, pending the decision of an appeal to be taken to the Supreme Court of the United States from this order, the said Christopher C. Wilson be placed in the custody of his counsel, John B. Stanchfield, and that proceedings for the commitment of said Christopher C. Wilson to the custody of the Marshal, as provided in this order, be stayed until the final decision of the Supreme Court upon this appeal, provided that said appeal to the Supreme Court be prosecuted at once and with all convenient speed, and that counsel for the relator join with counsel for United States in moving before the Supreme Court of the United States for an immediate hearing of said appeal; or until the further order of this court in the premises.

E. HENRY LACOMBE,
Circuit Judge.

(Endorsed:) U. S. Circuit Court, Southern District N. Y., Filed Nov. 9, 1910. John A. Shields, Clerk.

73 Circuit Court of the United States, Southern District of New York.

In the Matter of the Application of CHRISTOPHER C. WILSON for a Writ of Habeas Corpus.

Petition for Appeal and Allowance.

Christopher C. Wilson feeling aggrieved by the order of this court made on the 9th day of November, 1910, dismissing the writ of habeas corpus heretofore allowed herein on the 1st day of November, 1910, comes now by John B. Stanchfield, his attorney, and hereby appeals from said order to the Supreme Court of the United States and petitions this court for an order allowing said Christopher C. Wilson to prosecute said appeal to said Supreme Court of the United States according to the laws of the United States in that behalf made and provided, and that a transcript of the record and proceedings and papers upon which said order was made, duly authenticated, may be sent to said Supreme Court, and also that all proceedings in this court herein be suspended and stayed until the determination of said appeal by the Supreme Court of the United States, or until the further order of the court in the premises. And your petitioner will ever pray.

JOHN B. STANCHFIELD,
Attorney for C. C. Wilson.

The foregoing appeal and stay prayed for is hereby allowed and the petitioner Wilson placed in the custody of his counsel pending

the determination of said appeal by the said Supreme Court of the United States.

E. HENRY LACOMBE.
U. S. Circuit Judge

74 (Endorsed:) Due, timely and proper service of a copy of the within Petition for Appeal and Allowance is hereby admitted this 9th day of November 1910. Henry A. Wise, Attorney for U. S.—U. S. Circuit Court, Southern District N. Y., Filed Nov. 9, 1910, John A. Shields, Clerk.

75 *Assignments of Error.*

United States Circuit Court, Southern District of New York.

In the Matter of the Application of CHRISTOPHER C. WILSON for a Writ of Habeas Corpus.

Now comes the above named Christopher C. Wilson by his counsel and files the following assignment of errors upon which he will rely upon the prosecution of the appeal sued out by him in the above entitled proceeding to review the order of said United States Circuit Court for the Southern District of New York, made and entered on the 9th day of November, 1910, dismissing the writ of habeas corpus heretofore sued out by said Christopher C. Wilson, as follows:

1. That said Circuit Court erred in dismissing the said writ of habeas corpus by its order by which it was

"Ordered that said writ of habeas corpus be, and the same hereby is, dismissed and the relator Christopher C. Wilson remanded to the custody of William Henckel, United States Marshal for the Southern District of New York to be detained by said Marshal in accordance with the order of this court dated November 1, 1910."

2. That said Circuit Court erred in not granting an order allowing said writ of habeas corpus and discharging the said Christopher C. Wilson from custody.

And the said Christopher C. Wilson aforesaid, the appellant prays that the order entered herein on the 9th day of November, 1910, dismissing said writ of habeas corpus for the errors aforesaid and other errors in the record and proceedings herein may be reversed and altogether held for nothing, and that said Circuit Court
76 be directed to enter an order discharging said Christopher C. Wilson from custody forthwith.

Dated, New York, November 9, 1910.

JOHN B. STANCHFIELD,
Attorney for Christopher C. Wilson, Appellant.

(Endorsed:) Due, timely and proper service of a copy of the within Assignment of Errors is hereby admitted this 9th day of November, 1910. Henry A. Wise, Attorney for U. S.—U. S. Circuit Court, Southern District N. Y., Filed Nov. 9, 1910, John A. Shields, Clerk.

77 By the Honorable E. Henry Lacombe, one of the Judges of the Circuit Court of the United States for the Southern District of New York, in the Second Circuit.

To United States of America, Greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States at a Term to be holden at the City of Washington, District of Columbia, within thirty days from the date hereof pursuant to an order allowing appeal herein filed in the Clerk's Office of the Circuit Court of the United States for the Southern District of New York, wherein Christopher C. Wilson is appellant and you are appellee to show cause if any there be, why the order in said appeal mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand at the Borough of Manhattan, in the City of New York, in the Circuit above named this 9th day of November, in the year of our Lord one thousand nine hundred and ten, and of the Independence of the United States the one hundred and thirty-fifth.

E. HENRY LACOMBE,
Judge of the Circuit Court of the United States for the Southern District of New York, in the Second Circuit.

78 [Endorsed:] E. & A. D. 3164. (Original.) United States Supreme Court. Christopher C. Wilson, Appellant, vs. United States of America, Appellee. Citation. John B. Stanchfield, Attorney for Appellant, 5 Nassau Street, Borough of Manhattan, New York City. Due service of a copy of the within citation is hereby admitted. Henry A. Wise, U. S. Attorney. U. S. Circuit Court, Southern District N. Y. Filed Nov. 9, 1910. John A. Shields, Clerk.

79 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, John A. Shields, Clerk of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit, do hereby Certify that the foregoing pages, numbered from one to seventy-eight inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the cause entitled Christopher C. Wilson, Appellant, against United States of America, Appellee as the same remain of record and on file in my office.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 15th day of November, in the year of our Lord One Thousand Nine Hundred and

Ten, and of the Independence of the said United States the One Hundred and Thirty-fifth.

[Seal of U. S. Circuit Court, South. Dist. New York.]

JNO. A. SHIELDS, *Clerk.*

[Endorsed:] United States Supreme Court. Christopher C. Wilson, Appellant, vs. United States, Appellee. Transcript of Record from the Circuit Court of the United States for the Southern District of New York.

Endorsed on cover: File No. 22,409. S. New York C. C. U. S. Term No. 788. Christopher C. Wilson, appellant, vs. The United States. Filed November 18th, 1910. File No. 22,409.

In the Supreme Court of the United States.

OCTOBER TERM, 1910.

CHRISTOPHER C. WILSON, PLAINTIFF IN error,
v.
THE UNITED STATES. } No. 759.

CHRISTOPHER C. WILSON, APPELLANT,
v.
THE UNITED STATES. } No. 760.

CHRISTOPHER C. WILSON, APPELLANT,
v.
THE UNITED STATES. } No. 788.

IN ERROR TO AND ON APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

MOTION TO ADVANCE.

On behalf of the United States, the Attorney-General respectfully moves the court to advance the above-entitled cases for hearing at the earliest possible date, for the following reasons:

The first of the above-entitled cases is a writ of error to review an order made at a criminal term of

the United States Circuit Court for the Southern District of New York, on October 10, 1910, adjudging the plaintiff in error guilty of a contempt of court for obstructing and impeding the United Wireless Telegraph Company, a corporation, from complying with a subpœna duces tecum which was directed to and served upon said company.

The books and papers called for by the subpœna duces tecum above referred to are the property of the United Wireless Telegraph Company, of which company Christopher C. Wilson is the president, and are essential to the successful termination of an important investigation which the grand jury for the Southern District of New York has, for some time past, been carrying on in respect to alleged violations of sections 5440 and 5480 of the United States Revised Statutes by Christopher C. Wilson and other officers of the United Wireless Telegraph Company.

In response to the subpœna duces tecum Wilson appeared for the United Wireless Telegraph Company, but neither the company nor he produced the books and papers called for by the subpœna, although he admitted that he had them in his possession in the presence of the grand jury. Upon the failure of the company to produce the books and papers, and upon their removal from the presence of the grand jury by Christopher C. Wilson, Wilson was presented as in contempt of court, and the order committing him for contempt, above referred to, was made.

The second of the above entitled cases is an appeal from an order of said court made on October 11,

1910, dismissing a writ of habeas corpus sued out by Christopher C. Wilson after said commitment.

The third of the above entitled cases is also an appeal from an order of said court made on November 9, 1910, dismissing a writ of habeas corpus which had been sued out after the commitment of Wilson under a different order, to wit, an order of November 1, 1910.

The order of November 1, 1910, was also made after presentment by the grand jury, in which presentment Wilson was charged as in contempt of court for obstructing and impeding the United Wireless Telegraph Company from complying with a subpœna duces tecum also directed to and served upon said company, and calling for the production of the books and papers above referred to.

At the hearing of the latter presentment it was shown that the board of directors had called upon Wilson to deliver the books and papers called for by the subpœna to the company in order that it might comply with the subpœna, but that Wilson had refused to do so.

In each case the primary excuse offered by Wilson for preventing the United Wireless Telegraph Company from complying with a subpœna duces tecum is that the books and papers called for by it would tend to incriminate him.

Pending the determination of the questions involved in the above-entitled cases, all progress in the important investigation above referred to is stayed, and for more than seven weeks has been so stayed.

Judge Lacombe paroled Mr. Wilson in the custody of his counsel, and so stated in the order dismissing the writ of habeas corpus, on condition that counsel for Mr. Wilson join with counsel for the Government in moving this court for an immediate hearing on the appeal.

Wherefore it is respectfully suggested that the above-entitled cases be set down for hearing at the earliest possible date.

Notice of this motion has been served upon opposing counsel.

GEORGE W. WICKERSHAM,
Attorney-General.

NOVEMBER, 1910.

O

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 736.

CHRISTOPHER C. WILSON,

Plaintiff in Error,

vs.

THE UNITED STATES,

Defendant in Error.

No. 737.

CHRISTOPHER C. WILSON,

Appellant,

vs.

THE UNITED STATES,

Appellee.

No. 738.

CHRISTOPHER C. WILSON,

Appellant,

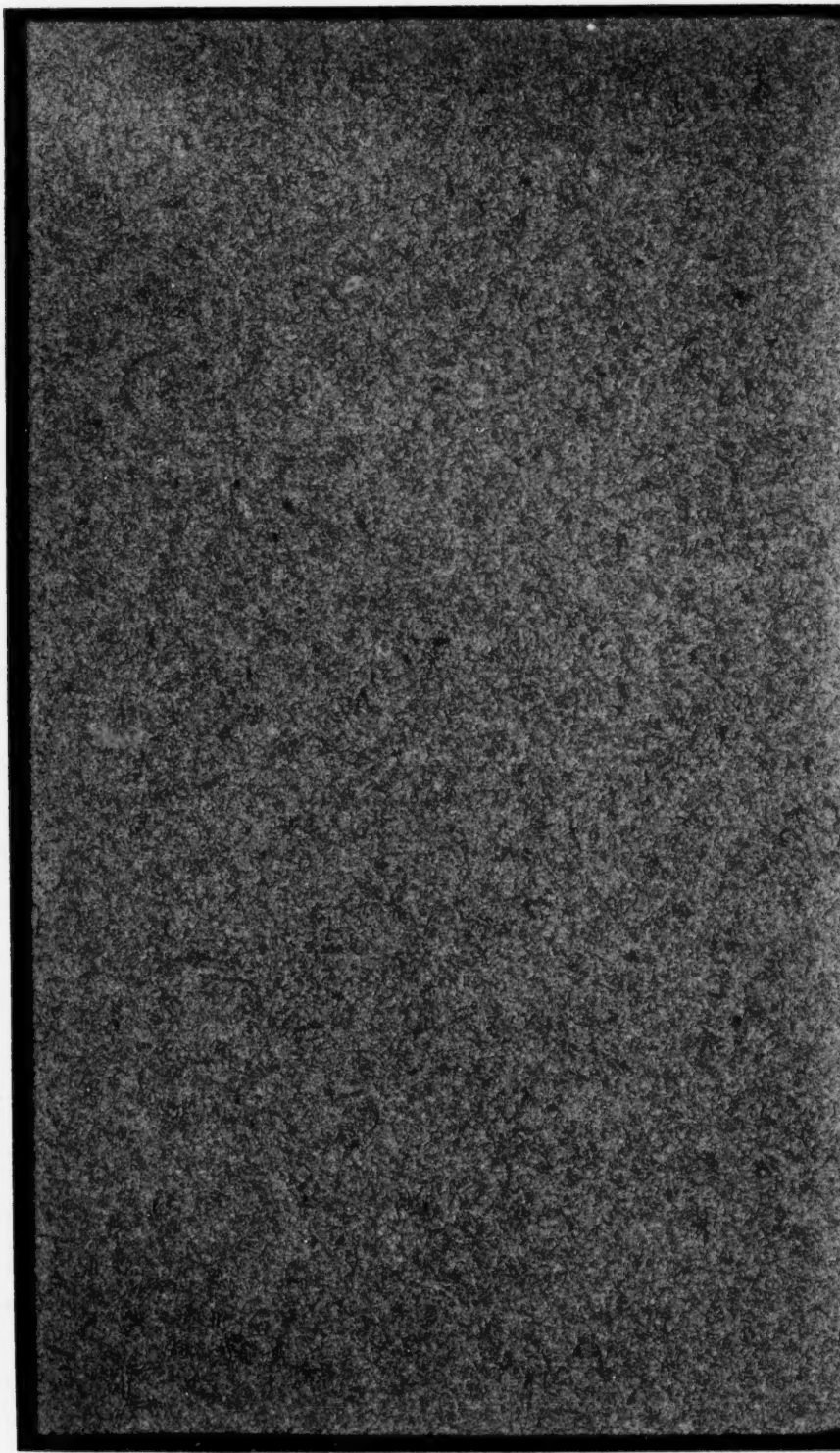
vs.

THE UNITED STATES,

Appellee.

Brief for Plaintiff in Error in 736, and Appellant in 737 and 738.

John B. Stanchfield,
Attorney for Plaintiff in Error and Appellant Wilson.
11 Pine Street,
Borough of Manhattan,
New York City.



IN THE

Supreme Court of the United States,

OCTOBER TERM, 1910.

CHRISTOPHER C. WILSON,
Plaintiff-in-Error,
v.
THE UNITED STATES.
} No. 759.

In Error to the Circuit Court of the United States for the Southern District of New York.

CHRISTOPHER C. WILSON,
Appellant,
v.
THE UNITED STATES.
} No. 760.

Appeal from the Circuit Court of the United States for the Southern District of New York.

CHRISTOPHER C. WILSON,
Appellant,
v.
THE UNITED STATES.
} No. 788.

Appeal from the Circuit Court of the United States for the Southern District of New York.

NOTE.

These three cases were assigned to be argued together. They all involve the same alleged acts of contempt. To

avoid unnecessary duplication only No. 788 is referred to in this brief except that the preliminary statement of facts contains a brief description of the manner in which the three cases arose.

No. 759 is a writ of error issued to the Circuit Court of the United States for the Southern District of New York upon a judgment committing the plaintiff in error for contempt; No. 760 is an appeal from the Circuit Court for the same District from an order dismissing a writ of habeas corpus, sued out after such commitment; No. 788 is an appeal from the Circuit Court for the same District from an order dismissing a writ of habeas corpus sued out after a subsequent commitment imposed upon a repetition of the same alleged act of contempt.

BRIEF FOR PLAINTIFF-IN-ERROR (IN 759) AND APPELLANT (IN 760 AND 788).

Statement of the Case.

The appellant, Christopher C. Wilson seeks by this appeal the review of an order dismissing a writ of habeas corpus sued out after his commitment on an order adjudging him guilty of contempt; the alleged contempt being that he had prevented a corporation of which he was president from complying with a subpoena *duces tecum* addressed to the corporation and delivered to him requiring the production before the Grand Jury of the United States for the Southern District of New York of a letter press copy book in his possession containing copies of his own letters which letters he claims would tend to incriminate him.

The appellant is a citizen of and resident in the State of New York and has been for some time the President of the United Wireless Telegraph Company. (Fol. 1.) That Company is a corporation incorporated under the Laws of the State of Maine (fol. 1, 23), and having an office in New York City. The ap-

pellant is, and has been since June, 1910, in possession of a certain letter press copy book (fols. 4, 24, 40) containing copies of letters written and signed by him as President of the United Wireless Telegraph Company relating to the affairs of that corporation (fols. 23, 40), and also containing copies of private letters signed by him personally. (Fol. 31.)

On August 3, 1910, two indictments were filed in the United States Circuit Court for the Southern District of New York, one of which indictments charges the appellant and others with the alleged fraudulent use of the mails, and the other of which charges the appellant and others with a conspiracy to commit an offense against the United States, to wit, to make fraudulent use of the mails. These indictments show on their face that they are with respect to alleged acts and things done by the appellant with regard to the affairs of the United Wireless Telegraph Company. (Exhibits 2 and 3, fols. 41-69.)

On October 28, 1910, a subpoena was delivered to the appellant calling for the production on October 31, 1910, at 11 o'clock in the forenoon, of the letter press copy book before the Grand Inquest of the United States for the Southern District of New York. The subpoena was addressed to "United Wireless Telegraph Co., 42 Broadway, New York, N. Y.," without mention of any individual or officer and stated on its face that the letter press copy book was for the use of the Grand Jury "*in regard to an alleged violation of the statutes of the United States by Christopher C. Wilson*" (fol. 20). Other copies of the same subpoena were delivered to other officers of the Company (fol. 21). The return of the subpoena was adjourned to November 1, 1910. The appellant appeared before the Grand Jury on November 1, 1910, having with him said letter press copy book but declined to deliver the book to the Grand Jury or to permit its inspection by the Grand Jury, on the ground that the letters contained in the book would tend to incriminate him (fol. 25).

Thereupon the Grand Jury accompanied by the appel-

lant and the United States Attorney for the Southern District of New York went before the court and a presentment was orally made by the Grand Jury through the United States Attorney setting forth such refusal on the part of the appellant (fols. 22, 35). The court immediately, on the informal oral presentment thus made, entered an order adjudging the appellant to be in contempt, "for knowingly and wilfully obstructing and preventing said United Wireless Telegraph Company" and its directors "from obedience to said subpoena and for resisting said subpoena," and committed him to the custody of the United States Marshal "until he *delivers to United Wireless Telegraph Company* said books called for by said subpoena and ceases to obstruct and impede the process of this Court or otherwise purge himself of this contempt" (fols. 35, 37).

The appellant was not represented by counsel on this hearing, and had no opportunity to offer any defense, the court stating that the question involved could be determined on habeas corpus (fol. 35).

The appellant immediately sued out a writ of habeas corpus (Petition, Fols. 1-6, Writ, fol. 11), which was made returnable before the same judge who had made the order adjudging him in contempt. To this writ the United States Marshal made a return, annexing thereto copies of the order adjudging appellant in contempt, the subpoena on which the proceeding was based and the stenographer's minutes of the oral presentment and proceedings before the court terminating in the commitment of the appellant. To this return the appellant interposed an affidavit which referred to and had annexed copies of the indictments against him, and which further stated that the letter press copy book was from the time of its purchase in appellant's possession and control, and was used for copying letters and correspondence dictated and signed by the appellant; that the matters therein contained would tend to incriminate him and that his refusal was for that reason. (Fols. 38-40.) The court on the return and affidavit made an order dismiss-

ing the writ of habeas corpus and remanding the appellant to custody and from the order so made this appeal is taken. (Fols. 71-74.)

In addition to the facts already stated, the petition for the writ of habeas corpus verified by the appellant contains the allegations (which allegations are not traversed and must therefore be deemed to be admitted) that the appellant did not take possession of the book in anticipation of the service of a subpoena on him for its production, nor to evade any subpoena served on him for its production, and that the appellant in the preparation of his defense to the indictments has been and is still obliged to use the letter press copy book in question. (Fol. 4.)

The first subpoena for the production of the letter press copy book was served on appellant in the early part of October, 1910. (Fol. 40.)

Cases 759 and 760 arise from a commitment of the same appellant and plaintiff in error on October 10, 1910, for an alleged contempt identical in all respects with that involved in 788, with the single exception that in the earlier cases (759 and 760) an oath was administered to appellant by the Grand Jury, while in 788 no oath was administered.

In the later case (788) no writ of error was sued out on the order adjudging Wilson in contempt for the reason that such order was made practically on default, no opportunity being afforded him to procure counsel or present his defense, and the facts therefore would not completely appear in a record to review only the order of commitment. Judge Lacombe, as already pointed out, stated at the time he directed the commitment, that the matter could be worked out on habeas corpus. The writ of habeas corpus was made returnable before Judge Lacombe, who had made the commitment, and the appeal is taken from the order made by Judge Lacombe dismissing the writ of habeas corpus.

Specifications of Error.

The appellant, in 788, asserts that the court below erred in dismissing said writ of habeas corpus by its order appealed from.

The plaintiff in error, in 759, asserts that the court below erred in ordering and adjudging the said Wilson to be guilty of contempt of court.

The appellant, in 760, asserts that said court below erred in dismissing the writ of habeas corpus sued out in that case.

POINTS.

I.

Under the decisions, this Court must find from the undisputed facts of this case that:

(a) The disclosure of the contents of the letter press copy book, produced by appellant before the Grand Jury, would tend to incriminate him;

(b) The contents of the letter press copy book would form a link in the chain of evidence exposing him to indictment;

(c) The contents of said book would form a link in the chain of evidence exposing him to conviction on the two indictments previously found against him in the same Court.

In re Chapman, 153 Fed., 371;
In re Hale, 139 Fed., 496, S. C. affid. *sub nom.* *Hale* v. *Henkel*, 201 U. S., 439;
Fort v. *Buchanan*, 113 Fed., 156.

The reasoning of the Circuit Court of the United States in the first case above cited (*ex parte Chapman*, 153 Fed., 371) is equally applicable to the facts of this case. In that case the witness Chapman appeared before the Grand Jury in obedience to a subpoena *duces tecum* addressed to "John Doe, the Barber Lumber Company, a corporation, and L. G. Chapman, manager, Barber Lumber Company," and served upon Chapman, requiring him to produce certain books of said corporation of which he was manager. He was sworn, and under oath admitted that the books were in his possession, but declined to produce or exhibit them to the Grand Jury, on the ground, among others, that the production thereof would tend to incriminate him. Having been adjudged guilty of contempt for such refusal and committed, he obtained a writ of *habeas corpus*, and in the proceeding under said writ the Court held that he was not guilty of contempt and ordered his discharge from custody on the ground that he was protected in his refusal to produce the books by the provisions of the fourth and fifth amendments to the United States Constitution:

> "IV. The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated."
>
> "V. No person * * * shall be compelled in any criminal case to be a witness against himself."

The Court, per *Gilbert*, Circuit Judge, reasoned as follows (153 Fed., at pp. 375-6-7):

> "The fifth amendment, which provides that one may not be compelled in a criminal case to be a witness against himself, is closely allied with the fourth amendment, which inhibits unreasonable searches and seizures. Said the court, in Boyd *v.* United States, 116 U. S., 616-633:
>
> "'We have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different

from compelling him to be a witness against himself. We think it is within the clear intent and meaning of those terms.'

"On page 631 of 116 U. S. the court said:

" 'And any compulsory discovery by extorting the party's oath or compelling the production of his private books and papers to convict him of crime, or to forfeit his property, is contrary to the principles of a free government.'

"Elsewhere in the opinion, the court said:

" 'It is our opinion, therefore, that a compulsory production of a man's private papers, to establish a criminal charge against him or to forfeit his property, is within the scope of the fourth amendment to the Constitution in all cases in which a search and seizure would be, because it is a material ingredient and affects the sole object and purpose of search and seizure.'

"When a question is propounded to a witness in the course of his examination in court or before a grand jury, he may be compelled to answer, unless there is reasonable ground to apprehend that his answer may furnish a link in the chain of evidence that might expose him to criminal prosecution.

"On the trial of Aaron Burr, 25 Fed. Cas., 38, No. 14,692e, it was contended on the part of a witness that he was to be the sole judge of the effect of his answer. Chief Justice Marshall held that this was too broad a claim, but also held that it would be too narrow a rule to hold that a witness can never refuse, unless the answer will *per se* convict him of crime, and that the correct rule is that a witness is not compellable to disclose a single link in the chain of proof against him.

"In *Ex parte Irvine* (C. C. 74 Fed., 954), Judge Taft held that where, from the evidence and the nature of the question, the Court can definitely determine that the question, if answered in a particular way, might form a link in the chain of evidence to

establish the commission of a crime by the witness, the Court can inquire whether the witness claimed his privilege in good faith, otherwise it is only where the incriminating effect of the question is doubtful that the witness' motive may be considered, for in such a case his bad faith would tend to show that his answer would not subject him to any danger.

"The reasons why a witness may not be required to answer a question which he claims may tend to criminate him *apply with added force* to a case where he is ordered to subject to the inspection of a grand jury, books and papers which contain the record of his connection with transactions which are alleged to be criminal in their nature. In the present case, it is not perceivable that there can be any question of the good faith of the petitioner in declining to subject the books to examination. *Although they are in fact the books of the corporation, they are nevertheless to all intents and purposes his own books. They are records made by him or made under his direction, and are in his charge and control. They refer to transactions which he has conducted.* If they show the method in which the corporation acquired title to timber lands, they necessarily disclose his own acts. It is not denied that the presentation of the books and their inspection by the grand jury is desired for one purpose only. This is fully shown by the record of the proceedings before the Court. It is that they be resorted to to ascertain what individual or individuals may be subject to indictment for violation of the laws of the United States in acquiring title to timber lands. I think it very clear that if the books contained the evidence thus sought, tending to prove the violation of law, there was reasonable ground for concluding that they might have tended to incriminate the petitioner, and that therefore his plea of privilege should have been sustained."

In the second case above cited (*In re Hale*, 139 Fed., 496) the witness Hale appeared before the Grand Jury

in obedience to a subpœna *duces tecum* addressed to and served upon him, requiring him to produce certain papers of a corporation of which he was secretary and treasurer and a director. Hale appeared before the Grand Jury and was sworn, in a proceeding under the Sherman Act, but refused to produce the papers, on the ground, among others, that they might tend to incriminate him. He was adjudged guilty of contempt and committed. On a *habeas corpus* proceeding to test the legality of his commitment, the Circuit Court, per *Wallace*, Circuit Judge (139 Fed., at p. 501), said:

> "The contention for the petitioner that the order of the Court violates the constitutional prohibition against compelling a person to give evidence against himself in a criminal case would be clearly sound were it not for the effect of the immunity act of Congress of February 19, 1903, C. 708, 32 Stat., 848 (U. S. Comp. St. Supp., 1903, p. 365). *In view of his official relations with the corporation, it fairly may be assumed that the petitioner had participated personally in some of the acts or transactions which were the alleged offenses of the corporation, and was therefore originally responsible himself.*"

Referring to the judgment in *Boyd* v. *United States*, 116 U. S., 616, Judge Wallace continued (139 Fed., at p. 503):

> "This judgment concludes an inquiry by this Court as to the validity of two propositions, and it settled, first, that a subpœna or an order of the Court may be the equivalent of a search and seizure within the constitutional provision; and, second, *that any search or seizure for the purpose of obtaining incriminating evidence against the party, is an unreasonable one within the meaning of the provision.* The judgment would have controlled this case, and would have entitled the petitioner to be discharged, if the evidence sought to be procured could have been used to incriminate the petitioner."

The Court in that case, however, held that the evidence could not be used to incriminate the petitioner, because of his protection under the immunity statute, and refused his discharge. The order remanding him to custody was affirmed by the Supreme Court (Hale *v.* Henkle, 201 U. S., 43) on the ground that the prisoner *was protected by the immunity statute;* and the reasoning of the Supreme Court assumes the soundness of the reasoning of the Circuit Court in the quotations above made from its opinion, to the effect that, *except for the immunity statute,* the witness Hale would not have been guilty of contempt in refusing to produce the books for the inspection of the Grand Jury.

In the third case above cited (Fort *v.* Buchanan, 113 Fed., 156) a witness before a federal grand jury refused to answer questions on the ground that his answer would tend to incriminate him. He was adjudged guilty of contempt and committed, but the Circuit Court, on *habeas corpus* proceedings, held that he was justified in refusing to answer for the reasons stated in the opinion of the Court, per *Shelby,* Circuit Judge (113 Fed., 160-1), as follows:

> "In determining whether or not the witness is entitled to the privilege of silence, the Court may look at all of the circumstances of the case, and determine whether or not there is reasonable ground to apprehend danger to the witness from his being compelled to testify. If the fact that the witness is in danger appears, great latitude should then be allowed to him in judging for himself of the effect of any particular question. A question which might appear at first a very slight and innocent one might, by establishing a link in a chain of evidence, become the means of convicting the witness. *Ex parte Irvine* (C. C.) 74 Fed., 954. *In the case at bar it appears that the defendant was already indicted for the offense about which he was examined, and the questions tended to connect him with the offense for*

which he is indicted. There can be no doubt that under such circumstances, when the questions are such as seek to connect him with the crime under investigation, the Court will not require him to answer them."

In the cases at bar it is also quite evident that the production of the letter press copy book, while sought under guise of process, was desired for the very purpose of procuring evidence to be used against Wilson on the trial of indictments already pending.

II.

The privilege of a witness against producing books and papers under a subpoena *duces tecum* when the production thereof would tend to incriminate him, is even more fully protected than his privilege of refusing to make answer orally under an ordinary subpoena, when his oral answer would tend to incriminate him; because the former privilege is protected by both the fourth and fifth amendments, while the latter is protected by the fifth amendment only.

In the leading case of *Boyd* v. *U. S.*, 116 U. S. 616, an order had been made by the District Judge, under the Act of June 22, 1874, directing notice under seal of the Court to be given to the claimant, requiring the claimants, Edward A. and George H. Boyd, to produce an invoice of the cases of plate glass which had been seized by the collector as forfeited to the United States under the revenue laws. The claimants produced the invoice and when it was offered in evidence by the District Attorney on the trial of

the action *in rem* against the cases of plate glass, the claimants objected to its reception on the ground that, in a suit for forfeiture, no evidence could be compelled from the plaintiffs themselves, and also that the statute, so far as it purported to compel production of evidence to be used against the claimants, was unconstitutional and void. The Circuit Court overruled the objection and the matter went up to the Supreme Court which treated the order of the Court under the statute as being in effect a subpoena *duces tecum*, and in the prevailing opinion, per Bradley, *J.*, said:

> "The clauses of the Constitution, to which it is contended that these laws are repugnant, are the Fourth and Fifth Amendments. * * *
>
> In regard to the Fourth Amendment it is contended that, whatever might have been alleged against the constitutionality of the Acts of 1863 and 1867, that of 1874, under which the order in the present case was made, is free from constitutional objection, because it does not authorize the search and seizure of books and papers, but only requires the defendant or claimant to produce them. That is so; but it declares that if he does not produce them, the allegations which it is affirmed they will prove shall be taken as confessed. This is tantamount to compelling their production; for the prosecuting attorney will always be sure to state the evidence expected to be derived from them as strongly as the case will admit of. It is true that certain aggravating incidents of actual search and seizure, such as forcible entry into a man's house and searching amongst his papers, are wanting; and to this extent the proceeding under the Act of 1874 is a mitigation of that which was authorized by the former Acts; *but it accomplishes the substantial object of those Acts in forcing from a party evidence against himself.* It is our opinion, therefore, that a compulsory production of a man's private papers to establish a criminal charge against him or to forfeit

his property is within the scope of the Fourth Amendment to the Constitution, in all cases in which a search and seizure would be; because it is a material ingredient and effects the sole object and purpose of search and seizure.

The principal question, however, remains to be considered. Is a search and seizure or, what is equivalent thereto, a compulsory production of a man's private papers, to be used in evidence against him in a proceeding to forfeit his property for alleged fraud against the revenue law—is such a proceeding for such a purpose an '*unreasonable* search and seizure' within the meaning of the Fourth Amendment of the Constitution? Or is it a legitimate proceeding? * * *

We have already noticed the intimate relation between the two Amendments. They throw great light on each other. For the 'unreasonable searches and seizures' condemned by the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment; and compelling a man 'in a criminal case to be a witness against himself', which is condemned in the Fifth Amendment, throws light on the question as to what is an 'unreasonable search and seizure' within the meaning of the Fourth Amendment. And we have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself. We think it is within the clear intent and meaning of those terms. * * *

We think that the notice to produce the invoice in this case, the order by virtue of which it was issued, and the law which authorized the order, were unconstitutional and void, and that the inspection by the district attorney of said invoice, when produced in obedience to said notice, and its admission in evi-

dence by the court, were erroneous and unconstitutional proceedings."

It was evidently because of such considerations that Circuit Judge Gilbert in *Ex Parte Chapman*, 153 Fed., at p. 377, said:

> "The reasons why a witness may not be required to answer a question which may tend to incriminate him apply *with added force* to a case where he is ordered to subject to the inspection of a grand jury books and papers which contain the record of his connection with transactions which are alleged to be criminal in their nature."

There would seem to be no question as to the correctness of the elementary proposition laid down in *U. S.* v. *Collins*, 146 Fed., at p. 555, as follows:

> "The same principle applies to the production of papers. When it is once made to appear that they will tend to incriminate the witness, he is as much protected from the harm that would befall him by reason of a disclosure of their contents as from divulging incriminating matter by word of mouth. The result is the same in either event."

If Wilson would have been protected in his constitutional privilege, had he been sworn as a witness the Government's failure to permit him to be sworn cannot deprive him of such protection. He appeared before the Grand Jury and asked to be sworn. If by being sworn he became entitled to claim a privilege, certainly the Government cannot deprive him of that privilege by arbitrarily declining to swear him. Whether he was sworn or not the effect of the contents of the book would be the same.

> *United States* v. *Armour*, 142 Fed. Rep., 808, at 825.

III.

An officer of a corporation who actually holds, the physical possession, custody and control of books or papers of the corporation which he is required by a subpoena *duces tecum* to produce, is entitled to the same protection against exposing the contents thereof which would tend to incriminate him, as if the books and papers were absolutely his own.

Hale vs. *Henkel*, 201 U. S., 43, affirming;
In re Hale, 139 Fed., 496; S. C.;
Ex Parte Chapman, 153 Fed., 371.

In the case last above cited (*Ex parte Chapman*, 153 Fed., 371) the Circuit Court having held, as already set forth under Point I of this brief, that the witness Chapman would have been justified in refusing to produce the books of the corporation of which he was the manager if they had been his own private books and papers; the Court then took up the consideration of the second proposition of law above laid down as follows (153 Fed., at pp. 375-6-7-8):

> "But it is said that while one may not be compelled in a criminal case to produce his own books and records, if they tend to criminate him, he can claim no protection under either the fourth or the fifth amendment when, as here, he is called upon to produce, not his own books, but the books of a corporation of which he is an officer. In support of that view reference is made to McAlister *v.* Henkel, 201 U. S. 90, in which the Court said:
>
> 'Indeed the authorities are numerous to the effect that an officer of a corporation cannot set up the privilege of a corporation as against his testimony or the production of their books.'

"But here the petitioner is not setting up the privilege of the corporation as against the production of its books. He is asserting his own privilege, for his own benefit, on the ground that the books of the corporation, of which he is the custodian, will tend to incriminate him.

"In Hale *v.* Henkel, 201 U. S., 43, Hale, who was the secretary and treasurer of a corporation, had been subpoenaed to produce the books and papers of that corporation before a grand jury. He asked to be advised of the nature of the investigation in which he had been summoned. Upon being informed by the district attorney that it was a proceeding under the Sherman Act to protect trade and commerce against unlawful restraint and monopolies, and that, under Act Feb. 25, 1903, C. 755, 32 Stat., 904 (U. S. Comp. St. Supp., 1905, p. 602) no person could be prosecuted or subjected to any penalty on account of any matter or thing concerning which he might testify, or produce documentary evidence in any prosecution under said act, the witness refused to answer questions or to produce the papers and documents called for in the subpoena, upon the ground that they might tend to criminate him. He was committed for contempt, and *habeas corpus* proceedings were instituted for his release. On appeal to the Supreme Court, it was held, following Brown *v.* Walker, 161 U. S., 591, that the witness could not refuse to answer for the reason that the act of February 25, 1903, afforded him absolute immunity against future prosecution for the offenses as to which he was to be interrogated and was to produce books and documents. The Court said:

" 'The interdiction of the fifth amendment operates only where the witness is asked to incriminate himself; in other words, to give testimony which may possibly expose him to a criminal charge. * * * If the constitutional amendment were unaffected by

the immunity statute, it would put it within the power of the witness to be his own judge as to what would tend to incriminate him, and would justify him in refusing to answer almost any question in a criminal case, unless it clearly appeared that the immunity was not set up in good faith.'

"It is the clear meaning of these words (above quoted) and the plain import of the decision, that, but for the immunity statute, the witness would, under the fifth amendment, have had the right to judge for himself as to what would tend to incriminate him, and would have been justified in refusing to answer almost any question. And such was the view of the Court below in the decision from which the appeal in that case was taken. *In re Hale,* 139 Fed., 496. In that case, Wallace, Circuit Judge, said:

" 'The contention for the petitioner, that the order of the Court violates the constitutional prohibition against compelling a person to give evidence against himself in a criminal case, would be clearly sound, were it not for the effect of the immunity act of Congress of February, 1903.'

" 'And there were further remarks of the Court in that case which are particularly applicable to the present case.' Said the Court:

" 'In view of his official relations with the corporation, it fairly may be assumed that the petitioner had participated personally in some of the acts or transactions which were the alleged offenses of the corporation, and was therefore originally responsible himself.' * * * * * *

"*Although they are in fact the books of the corporation, they are nevertheless, to all intents and purposes his own books.* They are records made by him or under his direction, and are in his charge and control. They refer to transactions which he has conducted. If they show the method in which the corporation acquired title to timber lands, they necessarily disclose his own acts. It is not denied that the

> presentation of the books, and their inspection by the grand jury, is desired for one purpose only. This is fully shown by the record of the proceedings before the Court. It is that they be resorted to to ascertain what individual or individuals may be subject to indictment for violation of the laws of the United States in acquiring title to timber lands. I think it very clear that if the books contain the evidence thus sought, tending to prove the violation of law, there was reasonable ground for concluding that they might have tended to incriminate the petitioner, and that therefore his plea of privilege should have been sustained. * * *
>
> "Under the authorities, I am compelled to hold that the judgment committing the petitioner for contempt is void, and that he is entitled to be discharged from custody."

The principles above set forth have long been upheld by the courts of England. The fourth and fifth amendments to the Constitution merely continued the right which was guaranteed by the common law, a right which has always been jealously guarded when properly claimed.

A leading case in England in which a question arose similar to the one at bar was that of the *King* v. *Dr. Purnell*, 1 W. Blackstone, 37. In that case the defendant was the Vice Chancellor of Oxford University, and an information had been filed against him for not taking a deposition and for neglect of his duty both as Vice Chancellor and Justice of the Peace. The Attorney General moved for a rule directed to the proper officers of the University to permit their books to be inspected *in order to furnish evidence against the Vice Chancellor.*

The argument of the Crown in the above case shows no difference in principle from the argument of the Government in the case at bar. It follows:

> "The objection is that in criminal suits no one is bound to furnish evidence against himself. Agreed,

but a distinction may be made. When a man is a magistrate and as such has books in his custody, *his having the office shall not secrete those books which another Vice Chancellor must produce.*"

Lee, C. J., delivered the opinion of the Court:

"* * * Still we are all of the opinion that we cannot consistently with the rules of this Court, make such a rule. We ground ourselves on what has been done in similar cases though none so strong as this. * * * The information here is for a breach of and crime against the laws of the land and this is an application to search books which relate to the defendant's behavior as a member of a particular corporation."

The application for a rule directing inspection of the books was denied.

See also

R. v. *Granatelli*, 7 State's Trials, (N. S.) 979.

Wigmore on Evidence, at §2259, lays down the rule as follows:

"What is the effect of these two premises upon the questions that arise when discovery is sought from an officer or employee of a corporation—in the usual case, by a demand for the production of the corporate books?

"In the first place, the employee or officer cannot refuse to produce on the ground that the disclosure would affect the corporation. On the other hand, where the corporate misconduct involves also the claimant's misconduct, or where the document is in reality the personal act of the claimant, though nominally that of the corporation, its disclosures are virtually his own, and to that extent his privilege protects him from producing them."

IV.

The rights guaranteed to every natural person by the fourth and fifth amendments to the Federal Constitution are substantial, not merely formal and technical. Such substantial rights cannot be defeated by any fictional distinction by which the single and indivisable natural person is deemed to act or to be proceeded against in a representative capacity, and not in an individual capacity.

The acts of contempt which the Court adjudged the appellant to have committed were "knowingly and wilfully obstructing and preventing said United Wireless Telegraph Company" and its directors "from obedience to said subpoena and for resisting said subpoena" and by the order of the Court the appellant stands committed "*until he delivers to the United Wireless Telegraph Company said books called for by said subpoena and ceases to obstruct and impede the process of this Court, or otherwise purge himself of this contempt.*"

In the Court below the ground advanced by the Government in its effort to distinguish the cases at bar from the authorities hereinabove cited in this brief, holding that an officer of a corporation cannot be compelled to produce books of the corporation in his possession, tending to incriminate him, was based on the fact that in the cases at bar the subpoena was addressed to the corporation, while in the authorities referred to the subpoena was addressed to the individual officer by name.

The question at issue, therefore, apparently resolves itself as follows:

Can an officer of a corporation who is in possession of a book of the corporation containing a record made under his direction of his own acts and statements and tending to incriminate him, be compelled in a criminal proceeding against himself to produce and permit the inspection of such books (either directly or by being

forced to turn the book over to some other officer of the corporation) by means of a subpoena *duces tecum* addressed to the corporation directing the production of the book in question.

Assuming, for the purposes of the argument under this Point, that the subpoena was properly addressed to the corporation only, and that it was properly served upon the corporation, it would still be true first that the corporation and its officers could only be compelled to comply with such requirements of the subpoena express or implied as could lawfully be inserted or implied in a subpoena *duces tecum*, and second, that compliance with the lawful requirements of the subpoena could only be compelled in so far as such compliance did not deprive any natural person of a privilege to which he was entitled under the Constitution. Wilson, the president of the corporation, was the natural person actually in possession of the letter press copy book when the subpoena was served. The subpoena did *not* on its face purport to require Wilson to *deliver the book to some other person* in order that such other person might produce the book before the Grand Jury, and did not purport to require the corporation to cause the book to be so delivered to some other person by Wilson.

It seems clear that no such requirement can be implied in a subpoena *duces tecum*, and that if such a requirement had been expressly contained in the subpoena it would have been void and without effect.

A subpoena *duces tecum* is a possessory writ. It searches all books and papers in the possession of the witness at the time of the service of the subpoena and in the eye of the law seizes such as are specified in the subpoena and are then in the possession of the witness.

President &c., of the Bank v. *Hilliard*, 5 Cowen (N. Y.) 153, at p. 158.

Nelson v. *United States*, 201 U. S., 92, at pp. 115, 116.

Hall v. *Young*, 37 N. H., 134.

If any document specified in the subpoena is not then in the possession of the witness, the subpoena imposes no obligation on the witness to produce anything, and in such case the subpoena does not set the witness in motion to acquire possession. As a corporation must hold its fictional possession by virtue of the actual possession of some natural person representing it (*Nelson* v. *United States*, *supra*), a corporation subpoenaed to produce a paper (assuming that a corporation can be properly subpoenaed) is not required by the subpoena to shift the actual possession from the natural person then holding the paper to some other person nor is the natural person holding the paper required by such a subpoena to shift its possession to some other person.

If after service of a subpoena the witness subpoenaed, whether a corporation or natural person, shifts possession of a paper called for by the subpoena, then the witness is responsible for the consequences, and if failure to produce the paper should result from the shifting of possession, the witness might be punishable for failure to produce the paper, unless satisfactory explanation could be made. If, however, the witness, whether natural person or corporation, presents the paper called for by the subpoena in the same condition as regards its possession as when the subpoena was served, then the duty of the witness has been fully discharged. In the case at bar, when the subpoena was served on Wilson, the book called for was and for a long time had been in his actual possession. When Wilson appeared before the Grand Jury with the book, in exactly the same condition in which the corporation held possession when the subpoena was served, then the corporation had made full compliance with all the requirements of the subpoena, and Wilson standing before the Grand Jury producing the book called for was entitled then, if ever, to claim his constitutional privilege.

Moreover, the effect of such a subpoena must necessarily be subject to the privileges conferred by the fourth and fifth amendments of the Constitution, upon the natural person in possession of the paper sought at the

time the subpoena is served and whom it is ultimately sought to constrain thereby.

In the cases at bar the contempt, if any, must be predicated on one of two theories: (*a*) That he is guilty of contempt for having acquired possession of the book, in order to withold the same under claim of privilege; or (*b*) That he is in contempt for having possession of the book and withholding the same under claim of privilege.

The subpoena in the case at bar was served upon Wilson several months after he came into the exclusive possession of the book and the record will be searched in vain for any evidence that at the time he took possession of the book a proceeding was pending or was about to be pending in which the book would be required, or that he had any reason to believe when he acquired possession of the book that it would ever be sought in any proceeding by the Government. Therefore the record is devoid of any fact which would show contempt by Wilson in his original taking of the book.

The case presented therefore is merely that of a witness properly having possession of the book and being required to produce it, and the Government is therefore compelled to predicate the alleged contempt upon the mere fact that Wilson having the book declines under claim of privilege to produce the same; and that by indirection, not by direct subpoena to him but by subpoena to the corporation, he can be compelled to resign and waive his constitutional rights.

It is submitted that the Court should not countenance the overriding of the substantial rights of a defendant, by indirection, as is attempted in this case.

V.

The subpoena *duces tecum* addressed to the corporation only was unauthorized and void.

In *Hale* vs. *Henkel*, 201 U. S., 43, Mr. Justice Brown said that a corporation in the matter of testifying "can

only be heard by oral evidence in the person of some of its agents or employees." It was because in that case that the particular officer brought before the Grand Jury by subpoena, had been by statute given full individual immunity from prosecution that the subpoena was held valid.

In *Wertheim* vs. *Continental Trust Co.*, 15 Fed Rep. 716, Judge Wallace said in part at pages 717-718:

> "The corporation can only act through its officers. The suggestion that the books are in the legal custody of the corporation and not of its officers may be theoretically correct. If technically true, it is not an objection to compelling the officers to produce them. * * *."

In *Crowther* vs. *Appelby*, L. R., 9 C. P., 27, Lord Denman asks:

> "When documents are in the possession of a Company, who but the secretary can be subpoenaed to produce them?"

In *Nelson* vs. *U. S.*, 201 U. S., 92, the Court at pages 115-116, in part said:

> "It is as useless as attempting to demonstrate that twice two make four, to say that a corporation can have possession of nothing except by the human beings who are its officers; and it is to them not the intangible being they represent and act for that the law directs this process of subpoena and must procure its evidence."

Wigmore on Evidence, Section 2200:

> "When the documents desired are those of a corporation, its officer, who is their custodian, is the proper person to serve with process and to hold liable for non-production."

An additional objection to a subpoena addressed merely to a corporation, and not to any of the individuals who are its officers, is the following, which so far as we are able to learn, has never before been urged against the validity of such a subpoena.

The clerk is required to keep a docket of all subpoenaes issued. Section 829 of the Revised Statutes provides that he shall insert the names of as many witnesses in each subpoena as convenient, to save unnecessary expense. The Court, in *U. S.* vs. *Ralston*, 17 Fed. Rep., 895, Note on pages 901 to 905, construes at length the meaning of this section and says that it is in accordance with Article 6 of the amendments of the United States Constitution, and the English Bill of Rights of 1688, which is a part of our Constitutional law, that every accused person shall be entitled to know the names of the witnesses against him, whether such witnesses appeared before the Grand Jury, or are to appear on the trial; that his knowledge of these witnesses can only be obtained by the entries of the clerk, or when the practice is to endorse the names of Grand Jury witnesses on the foot of the indictment from such endorsement. It is evident that the name of a Company, such as "United Wireless Telegraph Company" would convey no intimation to the accused of the particular witnesses who appeared against him.

The Court in *U. S.* vs. *Ralston*, 17 Fed. Rep., 903, said:

> "I do not pretend that the prosecution is bound to disclose before trial all of the witnesses which the exigencies of the trial may render important especially in rebuttal. But I do hold that Article 6 of the Amendments (Constitution) required the prosecution to show before the trial by the record who the leading witnesses are on whom it relies."

In *re Shaw*, 172 Fed. Rep., 520.

Therefore, a subpoena addressed to a corporation merely would be entirely subversive of the right guaran-

teed by the Constitution and the English Bill of Rights.

It is therefore respectfully submitted that the *dictum* of Judge Lacombe in *U. S.* vs. *American Tobacco Co.*, 146 Fed. Rep., 557, and the decision of the same Judge *in re American Sugar Refining Company*, 178 Fed. Rep., 109, upholding the validity of a subpœna addressed to a corporation, and not to any officer thereof, which are believed to be the only decisions countenancing this practice, are not in accord with the spirit of Federal decisions, the Constitution of the United States, and the rights of an individual guaranteed since the English Bill of Rights.

VI.

The order adjudging the plaintiff in error and appellant guilty of contempt and the orders dismissing the writs of *habeas corpus* should be reversed and the plaintiff in error and appellant discharged from custody.

Respectfully submitted,

JOHN B. STANCHFIELD,
Attorney for Plaintiff in Error and Appellant.

Louis S. Levy
William M. Barlow
of Counsel

In the Supreme Court of the United States.

OCTOBER TERM, 1910.

CHRISTOPHER C. WILSON, PLAINTIFF in error, *v.* THE UNITED STATES. } No. 759.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

CHRISTOPHER C. WILSON, APPELLANT, *v.* THE UNITED STATES. } No. 760.

CHRISTOPHER C. WILSON, APPELLANT, *v.* THE UNITED STATES. } No. 788.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

STATEMENT, BRIEF, AND ARGUMENT FOR THE UNITED STATES.

STATEMENT.

The cardinal question in each of these three cases is the same. Nos. 759 and 760 are indeed but two modes of reviewing the same order, the first by writ

of error and the second by proceedings in habeas corpus. No. 788 is a habeas corpus proceeding based on a different order, but one of the same nature as that involved in Nos. 759 and 760.

The United Wireless Telegraph Co. is a corporation organized under the laws of Maine. Christopher C. Wilson, plaintiff in error and appellant in these cases, is its president; Cloyd Marshall is its secretary; and Charles C. Galbraith, Lucien C. Wallace, Edward P. Davis, William H. Sargent, and Frederick I. J. Hanson are directors.

During the September term, 1910, of the Circuit Court of the United States for the Southern District of New York, the grand jury of the United States for that district were engaged in investigating "an alleged violation of the statutes of the United States by C. C. Wilson." (Record in No. 759, p. 4.) This same thing is true in No. 788. C. C. Wilson is the Christopher C. Wilson who is the plaintiff in error and appellant in these cases.

Nos. 759 and 760.

In the course of their investigation the grand jury desired "Letter press copy books of United Wireless Telegraph Company containing copies of letters and telegrams signed or purporting to be signed by the President of said company during the months of May and June, 1909." A *subpœna duces tecum*, addressed to the company, was issued on October 7, 1910, and was served on the same day by exhibiting the original to Wilson, as president of the company, and leaving

with him a copy of the original, and on the 8th of October by exhibiting the original to Davis and Wallace, as directors of the company, and leaving with each of them a copy, and on the 10th of October by exhibiting the original to Marshall, as secretary of the company, and leaving with him a copy. The subpœna commanded appearance before and production of the books to the grand jury on the 10th day of October, 1910.

On the return day of the subpœna the grand jury at its place of session called the United Wireless Telegraph Co. and commanded its response to the subpœna. Wilson appeared, and in response to questions propounded to him when not under oath, stated "that he answered the call of said Deputy United States Marshal for said United Wireless Telegraph Company," but declined to answer further until he was sworn, and then, being sworn and inquiry being made in his presence whether the company produced the book called for, filed a written reply. (R., No. 759, p. 4.)

In this reply he recites the service of the subpœna, and states further that he is the president of the company; that the company is a Maine corporation "engaged in the lawful business of transmitting and receiving wireless messages and of manufacturing and constructing apparatus and appliances therefor, and of equipping boats and stations for the transmission and receipt of such messages;" that the letter-press copy books in question were during May and June, 1909, kept in his "office as President of said corpora-

tion, and were regularly used by me and for the most part, if not entirely, by me only, and contained copies of my personal and other correspondence, as well as copies of the correspondence relating to the business and affairs of said corporation;" that for the greater part of the time since May, 1909, "and all the time during the last month and more" the books have been in his possession, and "as against any other officer or employee of said corporation, or any other person, I have been entitled to such possession;" that he did not secure such possession in anticipation of or in order to evade the subpœna; that he and others, who were officers, directors, and stockholders of the company, were under two indictments, one for "having prior to July 3, 1909, devised a scheme to defraud by use of the mails by making false representations with reference to the business and property" of said company, and the other with having conspired to commit an offense against the United States of the nature of that charged in the first indictment; that he is using the books in question to prepare his defense to these indictments; that the books called for and their contents would tend to incriminate him; that he has the books with him before the grand jury, but without disrespect to the grand jury, and solely in protection of his legal rights, he declines to deliver them to the grand jury. (R., No. 759, pp. 6, 7.) He submits copies of the indictments, which may be found in No. 759, pages 8 to 24.

The matter being presented to the court, Wilson was adjudged to be in contempt, and was committed

to the custody of the marshal "until he shall cease to obstruct and impede the United Wireless Telegraph Company from complying with the subpœna duces tecum," etc. (R., No. 759, pp. 24, 25.)

The propriety of this order is the matter involved in Nos. 759 and 760.

No. 788.

There were renewed efforts to secure the book. On October 17, 1910, the directors of the company had a meeting, of which this is the record:

> "At a meeting of the Board of Directors held Monday, October 17th, 1910, the following motion was made, duly seconded and carried:
>
> "Whereas several members of the Board of Directors of the United Wireless Telegraph Company have been served with papers addressed to the U. W. T. Company and calling for the production before the United States Grand Jury of a letter-press copy book, or books, containing copies of letters and telegrams signed or purporting to be signed by the President of the Company, C. C. Wilson, and
>
> "Whereas no such book or books, is in the possession of this Company and it is impossible for the Company to produce such book, or books, and
>
> "Whereas we are informed that C. C. Wilson has been served with a paper calling for the production before the United States Grand Jury of the said book, or books, which paper is addressed to the U. W. T. Company;

"Now, therefore, be it resolved by the Board of Directors of the U. W. T. Company that the said C. C. Wilson be directed to produce the said book, or books, called for in the said paper, before the United States Grand Jury, in accordance with the said paper, and that he cause the same to be produced, and be it further

"Resolved, that a certified copy of this resolution be served on the said C. C. Wilson by the Secretary." (R., 16, 17.)

This resolution was drafted and typewritten in the office of the attorney for C. C. Wilson and sent to the directors for their guidance and, it was insisted by the Government, was a deliberate effort on the part of Wilson to prevent compliance with the command of the subpœna. (R., 17.)

On the 28th of October, 1910, another *subpœna duces tecum* was directed to the United Wireless Telegraph Co., 42 Broadway, New York City, N. Y., commanding it to produce before the grand jury at its session in the post-office building, in the city of New York, on the 31st day of October, 1910, at 11 o'clock in the forenoon, "letter press copy books of United Wireless Telegraph Company containing copies of letters and telegrams signed or purporting to be signed by the President of said Company during the months of May and June, 1909;" and this was stated in the subpœna to be "in regard to an alleged violation of the statutes of the United States by C. C. Wilson." (R., 5.)

This subpœna was served October 28, 1910, upon the company by exhibiting the original to Wilson, its president, to Cloyd Marshall, its secretary, and to Charles C. Galbraith, a director, and by leaving with each of the persons named a copy of the subpœna; and on October 29, 1910, by exhibiting the original to Lucien C. Wallace and Edward P. Davis, directors, and by leaving with each of them a copy of the subpœna; and on October 31, 1910, by exhibiting to William H. Sargent and Frederick I. J. Hanson, directors, the original, and leaving with each of them a copy. (R., 7.)

Thus service of the subpœna was made upon the company through the president, the secretary, and a majority of the board of directors.

On the return day of the subpœna the company was called by the grand jury at their place of session, and thereupon Wilson, Marshall, Wallace, Davis, Galbraith, Sargent, and Hanson, the persons upon whom as officers and directors of the company service of the subpœna had been made, entered the grand jury room, and in their presence and in the presence of the grand jury demand was made upon the company for the book. Wilson had the book with him, but would not produce it for the inspection of the jury. (R., 7, 8.)

The company was then directed to produce the book before the grand jury at 11 o'clock on the following day.

On the morning of November 1, 1910, the directors of the company had a meeting, a majority of the whole board being present, and these proceedings were had:

> "Upon motion duly made, seconded and carried, it was
>
> "Resolved, That the Board of Directors call upon C. C. Wilson and demand of him the possession of the letter-press copy-books called for in the subpoena of October 31st, 1910, for the production of same before the Federal Grand Jury." (R., 13.)

The directors at once demanded the book of Wilson, but he refused to deliver it. (R., 13.)

Wilson and the other officers and directors, upon whom service of the subpoena had been made, then went to the grand jury room, the jury being in session, and the company being called to respond to the subpœna, they all appeared before the jury and demand was again made upon the company for the book in the presence of the jury and all of the parties, and although Wilson was present, with the book in possession, he did not produce it to the jury, nor would he deliver it to the company or to any representative of the company to enable it to obey the process of the court.

The matter was then presented to the court, Wilson and the other officers and directors being in court at the time. The books called for, it was shown to the court, were books belonging to the United Wireless Telegraph Co., in which copies of the letters written by the president in respect of the

business of the company were preserved; and in the opinion of the grand jury an inspection of them was necessary. The books themselves had been bought and paid for by the company, and belonged to it and not to any individual. The by-laws of the company made no specific provision for the custody of the books and neither did the statutes of Maine. The books had been kept at the general office of the company at 42 Broadway, but shortly before the grand jury began its investigation Wilson removed them to his home and has retained possession of them ever since.

It was suggested that Wilson had some private letters in the book, to which the court replied:

"That don't make any difference. He can tear the private letters out and return the corporation letters to the corporation." (R., 16.)

Upon inquiry by the court, "What is the presentment precisely?" the Government's attorney answered:

> The Grand Jury presents that the corporation is in contempt of this court in not obeying the subpoena, that these gentlemen are in contempt of Court in that they have known and had actual notice of the subpoenas issued to the corporation requiring it to produce these books, and in defiance of this court and of its process have failed to take any action to have their corporation comply with the process, and that the defendant Wilson is in contempt of this court in that, knowing of this process, he is obstructing and impeding and preventing the corporation from complying with the process. (R., 14.)

The order of the court was:

> The Grand Jury of the United States Circuit Court for the Southern District of New York, having presented that United Wireless Telegraph Company and Cloyd Marshall, Charles C. Galbraith, Lucien C. Wallace, Edward P. Davis, William H. Sargent and Frederick I. J. Hanson, directors of said company, are in contempt of Court for failure to obey a certain subpoena duly issued out of this Court, dated October 28, 1910, and served on said United Wireless Telegraph Company, calling for the production by said United Wireless Telegraph Company of letter press copy books of United Wireless Telegraph Company containing copies of letters and telegrams signed or purporting to be signed by the President of said Company, during the months of May and June, 1909; and that Christopher C. Wilson is in contempt of Court for knowingly and wilfully obstructing and preventing said United Wireless Telegraph Company and said Cloyd Marshall, Charles C. Galbraith, Lucien C. Wallace, Edward P. Davis, William H. Sargent and Frederick I. J. Hanson, directors thereof, from obedience to said subpoena, and for resisting said subpoena of this Court.
>
> Now, after hearing the said presentment, and said United Wireless Telegraph Company, and said Christopher C. Wilson, Cloyd Marshall, Charles C. Galbraith, Lucien C. Wallace, Edward P. Davis, William H. Sargent and Frederick I. J. Hanson, directors thereof, having appeared to answer said presentment, and after hearing said United Wireless Telegraph

Company and said Christopher C. Wilson, Cloyd Marshall, Charles C. Galbraith, Lucien C. Wallace, Edward P. Davis, William H. Sargent and Frederick I. J. Hanson, the directors thereof, it is hereby

Ordered and adjudged that Christopher C. Wilson is in contempt of this Court, as charged in said presentment, and

It is further ordered that said Christopher C. Wilson be committed to the custody of the United States Marshal for the Southern District of New York until he delivers to United Wireless Telegraph Company said books called for by said subpœna, and ceases to obstruct and impede the process of this Court, or otherwise purge himself of this contempt. (R., 4.)

Wilson then filed his petition for a writ of habeas corpus, by which he challenged the validity of the order committing him for contempt, alleging:

1. That the court was without jurisdiction to entertain any charge of contempt against him.

2. That when he attended before the grand jury there was no cause or action of any kind pending in the court between the United States and any party mentioned in the subpœna.

3. That the grand jury was limited by the Constitution to the investigation of specific charges against particular persons, and there was then no specific charge against any particular person under investigation.

4. That the *subpœna duces tecum* is void as not in compliance with section 877 of the Revised Statutes, in that it requires the person addressed to

"appear," but not to "attend;" does not require the person addressed "to testify generally" on behalf of the United States; was not issued pursuant to any order of court; is addressed to the corporation and not to any of the officers; and would not apprise the defendant in any prosecution which might follow of the name of the precise witness who appeared pursuant thereto.

5. That the subpœna was not directed to him, but merely to the corporation.

6. That he can not be compelled to produce evidence, papers, or documents which tend to incriminate him, he being already under two indictments, and being also the party mentioned in the subpœna as guilty of the violation of the statutes of the United States, which was the subject of the grand-jury investigation.

7. That the book was then and long had been in his custody, and this custody had been obtained with no purpose of evading any process for it, and was in use by him for the preparation of his defense to the indictments pending against him.

8. That the proceedings are in violation of the rights secured to him by the Fourth and Fifth Articles of Amendment to the Constitution of the United States. (R., 1–3.)

The marshal made return to the writ setting up the presentment hereinbefore recited and the proceedings thereon. (R., 6–18.)

Wilson submitted an affidavit to which he annexed copies of the two indictments against himself. He

stated that the book called for would tend to incriminate him, and so, while he then had it in his possession, he should not be required to produce it or to testify as to its contents. The book, he said, was from the time of its purchase used for copying letters and correspondence dictated and signed by him, and had been taken by him to his home about the middle of June, 1910, and there it was when the first subpœna addressed to the corporation with respect to it was served on him. (R., 19, 20.)

The case was heard on the petition, the return and the affidavit; and from the order discharging the writ this appeal was taken.

POINTS AND AUTHORITIES.

I.

The grand jury was engaged in an inquiry which gave it authority to summon witnesses and to call for the production of books and papers.

Hale v. *Henkel* (201 U. S., 43).

II.

The subpœna duces tecum was a valid process.

United States v. *American Tobacco Co.* (146 Fed. Rep., 557).

In re American Sugar Refining Co. (178 Fed. Rep., 109).

Consolidated Rendering Co. v. *Vermont* (207 U. S., 541).

III.

No objection to the subpœna was made at any stage of the proceedings resulting in the order com-

mitting Wilson for contempt, and such objection can not be made for the first time in this court.

IV.

The search and seizure involved in the subpœna duces tecum were not unreasonable, since the subpœna was specific as to the person to whom it was directed and what was to be produced thereunder, and it was issued for the lawful purpose of securing material testimony in an investigation in which the grand jury were then engaged.

Hale v. *Henkel* (201 U. S., 43).

McAlister v. *Henkel* (201 U. S., 90).

Consolidated Rendering Co. v. *Vermont* (207 U. S., 541).

United States v. *American Tobacco Co.* (146 Fed. Rep., 557).

V.

Wilson was not required by the subpœna, nor by any of the proceedings thereon, "to be a witness against himself." The subpœna called for a book which belonged to the United Wireless Telegraph Co., which had come into the physical custody of Wilson simply as an officer or representative of the company, and had been recalled from such custody by formal action of the board of directors. He was not protecting himself in the possession of his own books and papers nor refusing simply to be a witness against himself, but was obstructing the company and its representatives, other than himself, in the performance of an order of the court for the production of books of the company, which they were willing to perform.

State v. *Davis* (108 Mo., 666).

State v. *Donovan* (10 N. Dak., 203).

People v. *Henwood* (123 Mich., 317).

State v. *Farnum* (73 S. Car., 165).

State v. *Davis* (69 S. E. (W. Va.), 639).

L. & N. R. R. Co. v. *Commonwealth* (21 Ky. Law Rep., 239).

McElree v. *Darlington* (187 Penn. State Rep., 593).

Pray v. *Blanchard Co.* (95 App. Div. (N. Y.), 423).

People v. *Coombs* (158 N. Y., 532).

Ex parte Hedden (90 Pac. (Nev.), 737).

Langdon v. *People* (133 Ill., 382).

Bradshaw v. *Murphy* (7 Car. & Paine, 612).

Evans v. *Moseley* (2 Dowling's P. C., 364).

Perry v. *Gibson* (1 Adolphus & Ellis, 48).

Sherman et al v. *Barrett* (1 McMullan (S. C.), 96).

United States v. *Armour & Co.* (142 Fed. Rep., 808).

THE ARGUMENT.

I.

The objection to the jurisdiction of the court below is disposed of by the case of *Hale* v. *Henkel.* (201 U. S., 43.) The grand jury was properly constituted, it was in session, and it was inquiring "in regard to an alleged violation of the statutes of the United States by C. C. Wilson." That the book or books called for were relevant to this inquiry was not and is not denied. What the court said in the *Hale* case is entirely applicable here.

> We deem it entirely clear that under the practice in this country, at least, the exami-

> nation of witnesses need not be preceded by a presentment or indictment formally drawn up, but that the grand jury may proceed, either upon their own knowledge or upon the examination of witnesses, to inquire for themselves whether a crime cognizable by the court has been committed; that the result of their investigations may be subsequently embodied in an indictment, and that in summoning witnesses it is quite sufficient to apprise them of the names of the parties with respect to whom they will be called to testify, without indicating the nature of the charge against them (p. 65).

II.

The *subpœna duces tecum* was a valid process. The record shows that it was authorized by the United States attorney. Whether there was an order of court for it does not appear. The record does recite that it "duly issued out of this Court." This means certainly that it issued in accordance with what that court recognized as proper usage. The only statutory provision respecting *subpœnas duces tecum* is section 869, R. S., and this is limited to the taking of depositions under a *dedimus potestatem*. In other cases the subpœna stands as the ordinary one and may be issued by the clerk upon application of an attorney in the cause. (*Johnson, etc., Co.* v. *North Branch Steel Co.*, 48 Fed. Rep., 191.)

The form of the subpœna is objected to. It is addressed to the company, and it is said the address should be to some individual as representative of the

company. It is urged that the company is a mere fiction and can not obey the subpœna, and so should not be served with it.

But a corporation may sue and be sued civilly, and it is subject to indictment for crime. It is therefore subject to service of process. This service is necessarily made upon some individual as representing the company, but it is none the less service upon the company. For many purposes the law deals with the corporation as an entity, and judgments, decrees, and orders are framed accordingly. If obedience is rendered, no question arises as to the difference between a corporation and an individual. When obedience is refused, the contumacy is that of some individual, and the offending individual must be dealt with, just as if the order were in a case where only individuals are concerned, and he is punished because he obstructs or defies the order, and this, whether he is or is not a party to the litigation. The cases referred to on the argument of Nos. 759 and 760 in the Circuit Court of Appeals, viz, *Hale* v. *Henkel* (201 U. S., 43), *Wertheim* v. *Continental Trust Company* (15 Fed. Rep., 716), *Crowther* v. *Appleby* (L. R. 9 C. P. 23, 27), *Nelson* v. *United States* (201 U. S., 92), do none of them hold that a *subpœna duces tecum* is invalid because *addressed* to a corporation. Nor does Wigmore so say in section 2200. Wigmore says simply that the officer who is the custodian of the books or papers desired is the proper person to serve with process and to hold liable for nonproduction.

The point made by appellant here was not made or considered in any of the cases cited.

Where the express question has been raised, the propriety of address to the corporation itself has been sustained. (*United States* v. *American Tobacco Company*, 146 Fed. Rep., 557, and *In re American Sugar Refining Company*, 178 Fed. Rep., 109.) That there is no inherent objection to such address is shown by *Consolidated Rendering Company* v. *Vermont* (207 U. S., 541), in which this court sustained a fine imposed upon a corporation for contempt of court committed by disobedience of a *subpœna duces tecum* addressed to it in its corporate character.

It is contended further that the constitutional right of confrontation by the witnesses against him is denied to Wilson, by anticipation, in addressing the subpœna to the company. This is predicated upon section 829 of the Revised Statutes of the United States, which provides that "to save unnecessary expense, it shall be the duty of the clerk to insert the names of as many witnesses in a cause in such subpœna as convenience in serving the same will permit." This was said by counsel to be in accordance with Article VI of the amendments to the Constitution, that every accused person shall be entitled to know the names of the witnesses against him, whether such witnesses appeared before the grand jury or are to appear on the trial. But there is no such constitutional amendment, and there is no such principle of constitutional law. The Sixth Amendment provides only as to this that "In all criminal prosecutions, the

accused shall enjoy the right. . . . to be confronted with the witnesses against him." This means only that the witnesses shall be produced at the trial, where they may be examined and cross-examined in the presence of the trial jury. It does not mean that the accused may confront them before the grand jury or that he shall be informed of every detail of proceeding had in the course of the inquest by the grand jury, which leads or may lead to an indictment against him. The note to *United States* v. *Ralston* (17 Fed. Rep., 895, 901) goes to no such extent and indeed has reference only to subpœnas issued in a case pending for trial.

There is no requirement of Federal law that the accused be furnished in advance of trial with the names of the witnesses against him, or that these names be indorsed on the indictment, except section 1033 of the Revised Statutes of the United States, which provides that in cases of treason a list of the witnesses shall be furnished the accused at least three entire days before the trial, and in other capital cases at least two entire days before the trial. As said in *Balliet* v. *United States* (129 Fed. Rep., 689, l. c., 692), "The maxim, 'Expressio unius est exclusio alterius,' clearly applies." In *Logan* v. *United States* (144 U. S., 263), section 1033 was under consideration, and the court said (p. 304): "The list of witnesses required to be delivered to the defendant is not a list of the witnesses on whose testimony the indictment has been found, or whose names are endorsed on the indictment; but it is a list of the 'witnesses to be pro-

duced on the trial for proving the indictment.'" And even this provision, while mandatory as to the Government, may be waived by the defendant.

The objection that the subpœna requires the party summoned to "appear" but not to "attend," and does not require the person addressed "to testify generally" on behalf of the United States, is predicated upon section 877 of the Revised Statutes of the United States, which reads:

> Witnesses who are required to attend any term of a circuit or district court on the part of the United States, shall be subpœnaed to attend to testify generally on their behalf, and not to depart the court without leave thereof, or of the district attorney; and under such process they shall appear before the grand or petit jury, or both, as they may be required by the court or district attorney.

This means simply that witnesses for the Government who may be required to testify in a number of cases shall not be subpœnaed separately in each, and that they shall not come and go with respect to each case, but, having come, shall stay until they have done as to all. As a convenient means to these ends, the statute directs that the Government subpœnas call for attendance "to testify generally" and forbid departure without leave of the court or the district attorney. The rule of the statute has in view reasonable economy in judicial administration. It is addressed to the officers of the court. "Do not issue two subpœnas and incur the costs incident thereto

when one will serve as well. Do not let a witness go home when you have finished with him in one case, if you have need of him in another case soon to follow." Economy is at once the sole purpose and effect of the rule. It has no relation or relevancy to the rights of the parties in any cause or proceeding in which the subpœna is issued. Not even the witness, we venture to say, would be permitted to excuse himself for disobedience to an order of court because it required him to "appear," rather than to "attend," and was specific as to the cause into which he was called, instead of summoning him "to testify generally."

III.

These objections to the regularity of process and procedure come too late. They were none of them made in the court below. On the contrary, whenever a subpœna was issued against the company Wilson responded as its representative, with the book under his arm, refusing, however, to submit it to the jury for inspection. He refused, also, to let the company, or any officer of it, have the book or produce it. He was present in court, and he was contumacious there; he refused obedience to the order of the court, and stood in its presence obstructing its process and defying its orders. It matters not how he came into court, whether in response to valid process or without process of any kind. He was there and subject to its jurisdiction lawfully exercised. The court found him guilty of contempt

for knowingly and willfully obstructing and preventing the company and its directors from obeying a subpœna directed to the company, the propriety and validity of which the company did not challenge, and for resisting that subpœna. He was ordered committed to the custody of the marshal until he delivers the book which he has in his possession to the company and ceases to obstruct the court's process. He can release himself at any time by doing what is easily within his power to do. He persisted in his refusal of obedience to the court's order and applied for release through a writ of *habeas corpus*. Upon the hearing he was remanded to the custody of the marshal, and that order of remand is now under review. And we may say of all these formal objections to the subpœna, as was said of a more substantial objection made in *Hale* v. *Henkel*, that they do "not go to the validity of the order remanding the petitioner." The marshal may rightfully keep custody of Wilson under the order of the court, unless Wilson may rightfully keep custody of the book against the order of the court.

IV.

Wilson asserts that the order remanding him, and as well the proceedings culminating in that order, are in violation of the Fourth Article of Amendment to the Constitution.

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not

> be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The right of reasonable search and seizure by the Government is as clearly implied by this amendment as the right of arbitrary or unreasonable search and seizure is denied.

The power of arrest is the power of seizure in its highest form. Security of the person is more sacred than security of house, papers, or effects. Yet the power of arrest is recognized by the law, and that, too, without formal warrant. It is essential not only to social order, but as well to personal liberty.

The question in every case is one of reasonableness. Where a warrant is proper, it must be upon probable cause, supported by oath or affirmation, and must particularly describe the place to be searched and the thing to be seized.

This court said in *Hale* v. *Henkel* that "the search and seizure clause of the Fourth Amendment was not intended to interfere with the power of courts to compel, through a *subpœna duces tecum*, the production, upon a trial in court, of documentary evidence." (201 U. S., 73.) We may concede for the purposes of this case that the subpœna may bear in some instances a close analogy to the search warrant, but, even so, the subpœna in this case meets every requirement of the Constitution. The probable cause is supplied by the judgment of the grand jury that a

certain book is necessary as evidence in an inquiry they are making as to supposed violations of law by Wilson. The subpœna is issued in due course of law, directed to the United Wireless Telegraph Co., and calls for books so specifically described as to designate one particular book of the company as to whose identity there is no question. There is no resemblance to the writs of assistance against which Otis contended, or to the general warrant used to discover the writer of the North Briton, No. 45. The subpœna is not invalid for want of any specification.

The book called for is one that the Government certainly may demand of the company. It does not stand upon the footing of an individual in this respect. After considering the rights of individuals the court, in *Hale* v. *Henkel*, take up the case of corporations and say (201 U. S., 74, 75):

> Upon the other hand, the corporation is a creature of the State. It is presumed to be incorporated for the benefit of the public. It receives certain special privileges and franchises, and holds them subject to the laws of the State and the limitations of its charter. Its powers are limited by law. It can make no contract not authorized by its charter. Its rights to act as a corporation are only preserved to it so long as it obeys the laws of its creation. *There is a reserved right in the legislature to investigate its contracts and find out whether it has exceeded its powers.* It would be a strange anomaly to hold that a State,

having chartered a corporation to make use of certain franchises, could not in the exercise of its sovereignty inquire how these franchises had been employed, and whether they had been abused, *and demand the production of the corporate books and papers for that purpose.* The defense amounts to this: That an officer of a corporation, which is charged with a criminal violation of the statute, may plead the criminality of such corporation as a refusal to produce its books. To state this proposition is to answer it. While an individual may lawfully refuse to answer incriminating questions unless protected by an immunity statute, *it does not follow that a corporation, vested with special privileges and franchises, may refuse to show its hand when charged with an abuse of such privileges.*

It is true that the corporation in this case was chartered under the laws of New Jersey, and that it receives its franchise from the legislature of that State; but such franchise, so far as they involve questions of interstate commerce, must also be exercised in subordination to the power of Congress to regulate such commerce, and in respect to this the General Government may also assert a sovereign authority to ascertain whether such franchises have been exercised in a lawful manner, with a due regard to its own laws. Being subject to this dual sovereignty, the General Government possesses the same right to see that its own laws are respected as the State would have with respect to the special franchises vested in it by the laws of the

> State. The powers of the General Government in this particular in the vindication of its own laws, are the same as if the corporation had been created by an act of Congress. It is not intended to intimate, however, that it has a general visitatorial power over state corporations.

It is to be borne in mind, too, that the company is not complaining, and, upon the other hand, has attempted to secure the book and comply with the order of the subpœna. Wilson is hindering the company in this endeavor. He refuses, upon the demand of the company, to surrender the book which belongs to it and which he got originally and could continue rightfully to hold only as the representative of the company.

But the right of the individual against search and seizure is not absolute. He is subject to seizure and to search upon arrest for crime. The weapon found upon his person may be evidence of a crime committed by him. So the possession of burglars' tools or of counterfeit money by him, although that possession is discovered by search of his person, may be offered as evidence against him. And search warrants may be used to secure the means of crime, and when they are secured they may be used as evidence. In *Adams* v. *New York* (192 U. S., 585, l. c. 598) this court said:

> The right to issue a search warrant to discover stolen property or the means of committing crimes, is too long established to require discussion. The right of seizure of lottery

> tickets and gambling devices, such as policy slips, under such warrants, requires no argument to sustain it at this day. But the contention is that, if in the search for the instruments of crime, other papers are taken, the same may not be given in evidence. As an illustration, if a search warrant is issued for stolen property and burglars' tools be discovered and seized, they are to be excluded from testimony by force of these amendments. We think they were never intended to have that effect, but are rather designed to protect against compulsory testimony from a defendant against himself in a criminal trial, and to punish wrongful invasion of the home of the citizen or the unwarranted seizure of his papers and property, and to render invalid legislation or judicial procedure having such effect.

The Fourth Amendment secures the people "in *their* persons, houses, papers and effects." It secures the individual in *his* person, *his* house, *his* papers, and *his* effects. In *Hale* v. *Henkel* it is said (201 U. S., 71) "that the compulsory extortion of a man's . . . *private* papers, to connect him with a crime or a forfeiture of his goods, is illegal, is . . . the equivalent of a search and seizure—and an unreasonable search and seizure—within the Fourth Amendment." And again, on page 76, it is said that the substance of the offense against the amendment "is the compulsory production of *private* papers, whether under a search warrant or a *subpœna duces tecum*."

The language used is carefully qualified and limited to *private* papers—to what is the man's own. A man is not secured by the Constitution in anything and everything that he may in any manner get in possession.

The book here involved is confessedly the book of the corporation, bought by it and used for the purposes of, and in the course of conducting, its business. The company itself, acting through its board of directors, may determine the custody of the book and may change that custody from time to time. To deny this is to deny to the directors the control of the corporation, for whose proper management they are responsible. That Wilson may have copied some personal letters in the book does not make it his own, and the court below gave leave to him to extract all such. Were there here no question of criminality on Wilson's part, if he were here insisting only upon his right to the custody of the book as against the corporation, there could be no question as to the result. The contention of Wilson is simply to the effect that "the book was once the property of the company, but the stain of my guilt is upon it, and that stain makes the book mine."

V.

The Fifth Article of Amendment is perhaps more directly involved than the Fourth, and the appellant invokes the protection of that clause of the amendment which provides that "No person . . . shall

be compelled in any criminal case to be a witness against himself."

This clause has been given very wide scope. It is not confined to cases in which the person himself is being prosecuted; it is not confined to criminal proceedings, whoever may be accused. It extends to every case, civil as well as criminal. In *Counselman* v. *Hitchcock* (142 U. S., 547, l. c. 562) the court said:

> It is impossible that the meaning of the constitutional provision can only be, that a person shall not be compelled to be a witness against himself in a criminal prosecution against himself. It would doubtless cover such cases; but it is not limited to them. The object was to insure that a person should not be compelled, when acting as a witness in *any investigation*, to give testimony which might tend to show that he himself had committed a crime. The privilege is limited to *criminal matters*, but it is as broad as the mischief against which it seeks to guard.

If, now, the protection is extended to everything of which a man may have possession, in whatever manner he acquired or by whatever right he holds that possession, there is a broad and dangerous immunity given to faithless trustees, alike in public and private relations.

We submit that the Constitution by the Fourth Amendment does not secure any man in that to which he has no right, and by the Fifth Amendment gives no man the right to withhold or suppress any

evidence of his criminality, except the testimony of his own lips and of his own papers. His own lips he may seal if he will, and his own papers, and this he may do as a matter of constitutional right, but if he corrupts or compels another to silence he is obstructing the administration of justice, and so he is when he withholds from evidence the papers which belong to another.

The liquor laws of Missouri required the druggist to preserve all prescriptions compounded by him, and to produce them whenever required in any court or before any grand jury, and failing to do so he was to be punished as for a misdemeanor. This was objected to as violating the constitutional provision against self-incrimination in *State* v. *Davis* (108 Mo., 666). The court accepted the broad views announced by this court in *Boyd* v. *United States* (116 U. S., 616) and said:

> We entertain no doubt that the spirit of the constitutional protection, "that no person shall be compelled to testify against himself in a criminal cause," also precludes the seizure of one's private books and papers in order to obtain evidence against him. Cooley, Const. Lim. 370; Whart. on Evidence, sec. 751. Do prescriptions of druggists under section 4622 come within that class of private papers thus shielded from inspection by the constitution? We think not.
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> * * * * *
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> The chief purpose of their preservation, however, was evidently that they might be

used in giving aid to courts and grand juries in their proper and lawful endeavors to control and regulate the sale of intoxicating liquors within the limits prescribed by the legislature, and in the investigation of matters of public concern. In these respects all the prescriptions become public and not private papers, and the druggist merely their custodian.

It could not be insisted that the production of the official books of a collector, treasurer or other public officer could not be required in the investigation of his accounts, or used in evidence against him in a prosecution for official misconduct. The obvious reason is that the books are not the private property of the citizen, but the public records required to be kept by the officer.

The law imposing the duty upon druggists of preserving the prescriptions of physicians left with them, and of producing them before courts or grand juries, is as clearly required as the duty imposed by law upon any public officer to keep an account of the public money which passes through his hands.

Our conclusion is that section 4622 is constitutional, and all its requirements may be lawfully enforced (pp. 669–671).

In *State* v. *Donovan* (10 N. Dak., 203, 208, 209) the action was instituted by the State to abate an alleged liquor nuisance kept and maintained by the defendant in violation of a section of the North Dakota Penal Code. The defendant was a druggist, and pursuant to statutory requirement kept a record of all sales of intoxicating liquor made by him. The

law also provided that this record should be open for the inspection of the public at all reasonable times during business hours, and that any person so desiring might make copies thereof. On appeal, counsel for the defendant contended "that the books wherein the defendant kept the record of his sales were improperly admitted in evidence," and as to this the court said:

> The books in question were procured by counsel for the state from the defendant pursuant to an order of court, and were introduced in evidence, over the objection of the defendant "that the facts disclosed by said books might tend to criminate him." The objection is based upon sec. 13 of the state constitution, which provides that no person shall "be compelled in any criminal case to be a witness against himself," and upon the fifth amendment to the federal constitution, containing the same provision. This constitutional guaranty has been construed to protect witnesses against the compulsory production of private books and papers. *Boyd* v. *U. S.*, 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746; *Counselman* v. *Hitchcock*, 142 U. S. 547, 12 Sup. Ct. 195, 35 L. Ed. 1110. It is clear, however, that the protection afforded by said sections was not available to defendant upon the facts which here exist, and that the books were properly admitted. They are not private documents, but are public documents, which the defendant was required to keep, not for his private uses, but for the benefit of the public, and for public inspection (pp. 208, 209).

To the same effect and upon similar statutes are *People* v. *Henwood* (123 Mich., 317), *State* v. *Farnum* (73 S. C., 165), and *State* v. *Davis* (69 S. E. (W. Va.), 639).

In *L. & N. R. R. Co.* v. *Commonwealth* (21 Kentucky Law Reporter, 239) the production under *subpœna duces tecum* of a certain tariff sheet which the law required to be publicly posted was complained of as compelling self-incrimination, but the court said that "this was not a private paper, and the court might properly compel its production on the trial."

In *McElree* v. *Darlington* (187 Pa. State Rep., 593) the president of the corporation in question was under indictment for taking and receiving from Mary A. Burnett upon deposit a certain sum of money, with knowledge that he and the corporation he represented were then insolvent, and with intent then and there wilfully and fraudulently to embezzle the same. Prior to the indictment the company had gone into the hands of receivers. Subsequent to the indictment McElree, district attorney, and Burnett petitioned the Court of Common Pleas for leave to examine the books, papers, and accounts of the corporation then in the hands of the receivers. The purpose of the examination was to ascertain the condition of the corporation when the deposit to which the indictment related was made. The Court of Common Pleas dismissed the petition, on the ground that the examination proposed would constitute an infringement or denial of the rights of the party under

indictment. Mr. Justice McCollum, writing the unanimous opinion of the Supreme Court, said (pp. 595, 596):

> This ruling was obviously made on the assumption that the books and papers were the property of said party, and that an examination of them by persons interested in the affairs of the corporation as shareholders, bondholders or depositors was not admissible, because it might result in the discovery of transactions having a tendency to criminate him. But the books and papers of the corporation are not the property of the officers or employees, nor are they intended to protect them against the consequences of the frauds they may have perpetrated in their respective spheres of labor or duty. An officer or employee of a corporation who is under indictment for embezzlement of its funds may not require of his employer a suppression or concealment of his own entries in its books, although the entries may furnish the material clue to his crime and possibly afford satisfactory evidence of it.

In *Pray* v. *Blanchard Company* (95 Appellate Div. (N. Y.), 423) the court unanimously reversed an order denying a motion to punish the defendant, an officer of the Blanchard Co., for contempt of court, in refusing to comply with an order of court directing him to produce before a *referee* certain books and papers of the company. His refusal was based upon the ground that they would tend to criminate him. Judge McLaughlin said in his opinion:

> All that we determine is that he was bound to comply with the order of the court, and in refusing to do so was guilty of contempt and should have been punished therefor. It is a novel, if not somewhat startling proposition, that an officer of a corporation can refuse to produce its books, when he is asked to account for property which has been committed to his charge, upon the ground that the production of the books may tend to incriminate him. If such rule were to prevail it is not difficult to see how a person who had once obtained possession of the books of a public or private corporation might evade accounting for property which had come into his possession by doing what this witness did, viz., claiming that the production of such books would incriminate him, even though the production was solely for the purpose of enabling him to refresh his recollection concerning questions asked of him (pp. 425, 426).

In *People* v. *Coombs* (158 N. Y., 532) the defendant, who was coroner, was convicted of presenting a false and fraudulent bill to the city of New York for payment. He had caused his clerk to make some fictitious inquest papers, which he retained in his possession for the purpose of filing them with the county clerk at some future time as regular public papers. The district attorney subpœnaed the coroner's clerk to produce the papers in question, and in response to the subpœna they were produced by the clerk, and in this way came into the possession of the district attorney. At the trial they were produced, offered

in evidence, and received under objection and exception. The court said (pp. 539, 540):

> The contention of the learned counsel for the defendant is, that these were the defendant's private papers (says the Supreme Court of New York), and that their production at the trial by the People, under the circumstances stated, was in substance a violation of the defendant's constitutional rights. We think there was no search, no seizure, or a violation of any right secured to the defendant by the Constitution or by law. The papers were in a public office, in the custody of a clerk who was paid by the city. On their face they were public records and intended to be used as such. The district attorney could not know when he required their production under the subpoena that they were false or fictitious, and, even if he did, it cannot be said that a public officer is privileged to retain in a public office a fraudulent record made for the purpose of concealing a fraudulent claim for fees. The subpoena did not call for any private papers; only for public documents. The papers in question were produced in that character, and had they been genuine would have constituted evidence in favor of the defendant. The defendant was not in this way compelled to give evidence against himself within the meaning of the constitutional provision on that subject. A party on trial for making or uttering counterfeit money may always be confronted at the trial with the work of his own hands, and it has never, so far as I can learn,

> been supposed that this would be a violation of the constitutional right, exempting a citizen from unreasonable search or seizure or that it was compelling him to be a witness against himself.

Ex parte Hedden (90 Pac. (Nev.), 737) is not to be distinguished from the case at bar. Hedden and Lyon, both officers of the Tonopah, etc., Railroad Company, were served with a *subpœna duces tecum* in a criminal action against Hedden, to produce before a grand jury certain books and papers of the corporation. At the time the subpœna was served the books were in the possession of Lyon, but he turned them over to Hedden, under instructions from his company. Hedden, on being summoned before the grand jury, made the following statement (pp. 738, 739):

> I am the general superintendent of the Tonopah & Goldfield Railroad Company. I refuse to answer when I received the books from A. J. Lyon, for the reason of my constitutional right to refuse to testify against myself, and for the further reasons that the answers might tend to incriminate myself as well as the company. I am not the secretary of the company, who is the legal custodian of the books, and am only temporary custodian, and I refuse to answer all questions on that ground.

The grand jury then ordered Hedden to turn over the books to Lyon, but he refused to comply with the order. The lower court, upon substantially the foregoing facts, ordered Hedden to turn over the books to

Lyon and to be committed to the custody of the sheriff until he complied with the order. Hedden then petitioned the Supreme Court for a writ of habeas corpus, on the ground that the order of the lower court commanding him to turn over the books and papers in question to Lyon was void, because in effect it compelled him to become a witness against himself in a criminal proceeding against him then under investigation by the grand jury. The Supreme Court, in a unanimous opinion, rejected this contention, saying (pp. 742, 743):

> If the company had no objection to the producing of the books before the grand jury, certainly Hedden, who was not the legal custodian of the books at the time of the service of the subpœna on Lyon, *and not being his private property, no matter how he came into possession of them under the circumstances, would not be privileged to withhold them from the grand jury because of any personal constitutional privilege of his own.* It is claimed, however, because of the mere fact that they were in his possession at the time he appeared before, and they were demanded by, the grand jury, he could take refuge under his constitutional right not to be a witness against himself, and that the books also could not be taken from him or returned to the possession of the rightful custodian, because that, in effect, would be compelling him to become a witness against himself. . . . In addition to the classes of cases heretofore cited, which are recognized as exceptions to the general rule

> that no person in a criminal case shall be compelled to become a witness against himself, we are of the opinion that the facts and proceedings in this case warrant us in adding that no employe of a corporation who may obtain the possession of the books or papers belonging to a corporation, surreptitiously or otherwise, when not the legal custodian of such books or papers, and when such books or papers are not in any sense his private property, can lawfully refuse to produce them when legally ordered to do so.

This distinction between public and private papers is recognized in our legislation.

Section 859 of the Revised Statutes provides:

> No testimony given by a witness before either House, or before any committee of either House of Congress, shall be used as evidence in any criminal proceeding against him in any court, except in a prosecution for perjury committed in giving such testimony. *But an official paper or record produced by him is not within the said privilege.*

Section 30, chapter 2, Public Acts of Massachusetts (1882), page 57, provides that papers produced before the legislature, etc., tending to incriminate the witness "shall not be used as evidence against him in any criminal proceeding or penal action in a court of justice; but no official paper or record produced by such witness on such examination shall be held or taken to be included within such privilege so as to protect him in any such criminal proceeding or penal action."

In Illinois it is a crime for an outgoing official to withhold the records of the office from his successor, and a search warrant may be employed in such cases. (Secs. 216, 217, ch. 38 R. S. of Ill., 1909.) Witnesses in legislative inquiries may be compelled to testify and to produce books and papers, "but the testimony of a witness examined and testifying before either house of the General Assembly, any committee of either house, or any joint committee of the two houses, shall not be used as evidence in any criminal proceedings against such witness in any court of justice: *Provided*, that no official paper or record produced by such witness on such examination shall be held or taken to be included within the privilege of said evidence so [as] to protect such witness from any criminal proceeding as aforesaid." (Sec. 6, ch. 63, R. S. Ill., 1909.)

In *Langdon* v. *The People* (133 Ill., 382), the indictment was for forgery of requisition papers, upon which a warrant was issued by the Governor of Illinois. The papers, alike those forged and the Governor's warrant, were seized under a search warrant and offered and used in evidence against the defendant on the trial. Here were forged papers and genuine—the latter a public document and the former purporting to be such. The court said (pp. 397–399):

> The search and seizure shown by the proofs were not unreasonable. Section 2 of Division 8 of our criminal code authorizes search warrants to be issued "to search for and seize counterfeit or spurious coin, forged bank

notes *and other forged instruments*, or tools, machinery or materials prepared or provided for making either of them." The words, "other forged instruments," are broad enough to cover the certificate forged by plaintiff in error.

In *Boyd* v. *United States*, 116 U. S. 616, the Supreme Court of the United States, speaking through Mr. Justice Bradley, said: "the laws which provide for the search and seizure of articles and things, *which it is unlawful for a person to have in his possession for the purpose of issue or disposition*, such as counterfeit coin, lottery tickets, implements of gambling, etc., are not within the category of unreasonable searches and seizures. *Commonwealth* v. *Dana*, 2 Met. (Mass.) 329. *Many other things* of this character might be enumerated." In *Commonwealth* v. *Dana*, *supra*, the Supreme Court of Massachusetts, speaking of the article upon searches and seizures in the bill of rights, says: "This article does not prohibit all searches and seizures of a man's person, his papers, and possessions; but such only as are 'unreasonable,' and the foundation of which is not previously supported by oath or affirmation. The legislature were not deprived of the power to authorize search warrants for probable causes supported by oath or affirmation, and for the punishment or suppression of any violation of law. The law, therefore, authorizing search warrants in *certain cases*, is, in no respect, inconsistent with the declaration of rights."

What are the "certain cases" in which search warrants may be issued? What are the "many

other things", besides those above mentioned, for the seizure of which search warrants may be issued? They are enumerated by Cooley in his work on Constitutional Limitations, and among them he mentions "books and papers of a public character retained from their proper custody . . . and *forged bills or papers.*" (Cooley on Cons. Lim. 5th ed. top page 372, marg. page 306, note 1.) Among them must certainly be included the documents taken from the plaintiff in error. They were not private papers. One of them was a warrant issued by the Governor of Illinois to the Governor of Arkansas, requiring the latter to cause the arrest of a fugitive; another was a paper appointing the plaintiff in error an agent of the State of Illinois to bring a supposed violator of its laws from the State of Arkansas; still another was the forged certificate of a public officer of this State, without which the warrant and certificate of appointment would never have been issued. The forged certificate was the power that had been used to set in motion the action of the chief executive of the State. The warrant based upon the forged certificate might yet be used to secure the return of the fugitive; it was, therefore, unlawful for plaintiff in error to have it in his possession, as it was in his power to make an unlawful "disposition" of it.

Search and seizure may be made in "special cases where that which is the subject of the crime is supposed to be concealed, and the public or the complainant has an interest in it or in its destruction." (Cooley on Con.

> Lim. idem.). Here, the certificate, which was the subject of the crime of forgery, was concealed in the prisoner's office, and the public had an interest in its destruction that it might not be used wrongfully to procure action by the executive of a sister State. For this reason it was allowable to introduce it in evidence. (Idem.). (See also, *Commonwealth* v. *Dana*, *supra*.) We are, therefore, of the opinion that the trial court committed no error in admitting in evidence the papers taken from the prisoner's office over his objection that they had been procured by an unreasonable search and seizure.

Wigmore in his work on Evidence, dealing with the production of public documents, volume 3, section 2264, says:

> Where a document even though possessed or made or inscribed by the claimant of the privilege, is an official document, it is not protected by the privilege, because it is made or kept by him as an official holding a public trust and is therefore liable to inspection at any time, either by the proper authorities or (as in most cases) also by the public at large or by citizens interested. His assumption of the office involves an implied undertaking to yield the documents of the office to an inspection duly authorized. The judicial demand for its disclosure is therefore made against him as an official, and not as an accused person, and his status as the latter cannot annul or override his status as the former. This distinction seems generally accepted.

The distinction between public and private papers was recognized long ago in England. In *Bradshaw* v. *Murphy*, briefly reported in 7 Carrington and Payne 612, Lord Abinger held that "a vestry clerk who is called as a witness, cannot, on the ground that it may criminate himself, object to produce the vestry book, kept under the stat. 58 Geo. 3, c. 69, s. 2."

In re Hale (139 Fed. Rep., 496) and *Ex parte Chapman* (153 Fed. Rep., 371) are relied upon by the appellant as protecting him in his obstruction of the court's process.

In each of those cases the process was addressed to the person who asserted his right against self-incrimination, and in neither of them was the difference between the private papers of the party and papers held by him in a representative capacity seriously taken into account, and none of the cases we have cited seem to have been brought to the attention of the court.

The cases we have cited are based upon a sound principle. A man can not rightfully withhold public documents on any pretense whatever simply because they came rightfully into his physical custody as the incumbent of a public office. The papers are not his, and therefore he is not entitled to protection in the possession of them. He can not make them his by any lawful act and *a fortiori* not by any unlawful act.

It is clear that a county treasurer should turn over to his successor the books and records of his office.

It is equally clear that if he is a defaulter to his trust, the books of his office may contain matter that will tend to establish his guilt. May he take those books into his private custody and embarrass the operations of the county government because their use upon a trial would tend to prove his guilt? Regardless of the effect upon the operations of the county government, may he deliberately suppress or destroy this testimony as inherent in his right not to incriminate himself? He may be silent upon his trial and no comment even may be made upon this silence as a circumstance indicating guilt. Nothing that he has rightfully in possession can be taken from him and used against him. But beyond this the Constitution does not go. If he has money stolen from the treasury in possession, that may be taken from him, and the fact of that possession may be offered as evidence of his guilt. Recent possession of stolen property unexplained is in itself *prima facie* evidence of guilt. No right of an accused can be invaded for the purpose of establishing a wrong done by him, but immunity from self-exposure of one crime does not contain within itself the warrant for the commission of another crime. The immunity granted by the Constitution is purely personal. It marks the reaction against torture of every kind, mental as well as physical. When the prisoner stands mute there shall not be *peine forte et dure* to make him plead, but a plea of not guilty is entered for him, and without compulsion of his knowledge or information the accusation against him must be established. There

can be no inquisition by search either of his memory or of his memoranda. But this is the extent of his his right, and in the maintenance of this there is no wrong to others. To go beyond this is to sanction the suppression or destruction of evidence which may be given by witnesses other than himself or by papers other than his own.

The case seems plain beyond cavil when records and documents of a distinctive public character are involved, or articles like burglars' tools, counterfeit money, gambling paraphernalia, and other matériel of crime, or money, or property, the spoil of the thief or the embezzler. The reason is that the possession is wrongful, and so not entitled to protection.

Wherein is the difference between the books which are the records of a public office and the books which are the records of a corporation? They come each of them into the rightful custody of an individual in a representative capacity, and he holds them in rightful possession so long, and only so long, as he holds them in the one case for the public and in the other for the corporation. When he ceases so to hold them, whether it be because his relation to the public or to the corporation has terminated or because he has a purpose of his own to serve, neither public nor corporate, his right to possession is gone and the public or the corporation may recall the custody of them.

The subpœna here was not addressed to Wilson; but, to make his case as nearly as possible like those he relies upon, he has insisted that he be sworn and

examined by the grand jury as a witness, as if that were indispensable to the production of the book and a necessary consequence of employing the *subpœna duces tecum* to get it.

In *Evans* v. *Moseley* (2 Dowling's P. C., 364, l. c. 366), decided in 1834, the question of whether the person responding to a *subpœna duces tecum* could be compelled to produce the documents called for by it without being sworn as a witness was squarely raised. Baron Bayley, before whom the question arose, after consulting the other judges, held that he could be compelled to do so. The grounds for so holding are ably stated in his opinion, which is in part as follows:

> There was a question raised in this case, whether a bailiff having been called to produce a warrant had a right to claim to be sworn, or whether the plaintiff could insist on his producing the warrant without being sworn. Several *Nisi Prius* cases were cited, and we have consulted the Judges of the other Courts: the result of that consultation is, that we think the *Nisi Prius* cases were rightly rules, and that the officer was bound to produce the warrant without being sworn—the party calling him not being under any legal obligation to put a question. . . . The origin of the *subpœna duces tecum* does not appear: there is no instance of it prior to the time of *Charles* the Second; but without doubt there must previously have been *subpœnas* in use requiring the attendance of witnesses, and that they should produce documents: and, before the Statute of *Elizabeth* requiring the attendance of wit-

> nesses, there was a common law right in the Crown to issue a *subpœna* requiring a party to produce documents—not a *subpœna ad testificandum*, but merely to produce. If he did not obey, no doubt an application might be made in the ensuing term, by the party who calls for such production, for not producing the document. Whether he could be required to be sworn to make true answers as to the documents it is not necessary to decide, but probably he might; but if he were to omit to produce, he would be liable in the following term to an attachment. He has no right to require to be sworn to make himself a witness.

In *Perry* v. *Gibson* (1 Adolphus and Ellis, 48, 49) the plaintiff had no questions to ask of the person called to produce a certain book in response to a *subpœna duces tecum*, since he was able to identify the book by other evidence, and accordingly refused to have him sworn as a witness. The defendant insisted that the party should be sworn, but the defendant's contention was overruled. Park, J., said:

> I always thought that a *subpœna duces tecum* had two distinct objects, and that one might be enforced without the other.

In *Sherman et al.* v. *Barrett* (1 McMullan (S. C.), 96, l. c. 108) the court said of this writ:

> It does not require the person thus summoned, to testify, but to bring into Court a paper which the party needs. When this is done, nothing further is required. In the case of the *Treasurer* vs. *Moore*, (3 Brev. 550), it was ruled that before going into trial, the

> plaintiff had the right to have a return made to the subpœna *duces tecum*. This shows that the party need not put the person so summoned on the stand as a witness.

And in *United States* v. *Armour & Co.* (142 Fed. Rep., 808, l. c. 825), the court, in discussing the same question, said:

> No oath is essential to the compulsion to produce documents in a witness' possession. A person who is required to produce documents in his possession, and produces them, need not be sworn in order to get from him the documents. Perry v. Gibson, 1 Ad. & Ell. 48; Id., 3 Nev. & M. 462 (K. C. B.); Davis v. Dale, 1 M. &. M. 514; Simpson v. Smith, 1 Starkie on Ev. 161, note (n); Summers v. Moseley, 2 Cromp. & Mees. 477; 3 Wigmore, Sec. 1894, note 1.

The Government has never subpœnaed Wilson. It has not called on him either for oral testimony or for books or papers.

The subpœna has always been addressed to the United Wireless Telegraph Co., and has cited that company to appear and produce the books.

Wilson appeared October 10, 1910, pursuant to that subpœna, and upon call for the company entered the grand jury room and stated that he was there answering the call for the company. Upon his own insistence then he was sworn and presented a written statement, not on behalf of the company but on his own behalf, and in this statement says

that he has the book of the company called for, but will not submit it for inspection by the jury. He came as the company's representative, to manifest its obedience to the court's order, but instead of rendering that obedience in full measure he changed suddenly to his individual capacity and refused. The man Wilson defeated the purpose of Wilson, the company's messenger. And so the court held him to be in contempt for "obstructing and impeding said United Wireless Telegraph Company from complying with and obeying the process of this Court."

To make more manifest the obedient disposition of the company, and to give himself greater facility for action in his double capacity, on October 17, 1910, he caused the company to declare that it did not have the book and so could not itself produce it, and to direct him to produce the book before the grand jury in accordance with the subpœna. (R., 16, 17.) He appeared before the grand jury again on October 31 and brought the book, but again refused to produce it to the grand jury—defying the order of the subpœna and also the order of the company's board of directors which he himself had caused them to make.

On November 1 the company, by its board of directors, entered a formal order calling for delivery of the book to them by Wilson, and in pursuance of this order, the directors made a demand upon him for the book. They did this that they might produce the book before the grand jury. Again Wilson defied

the command of the subpœna and the demand of the company. The company and its officers and directors, save Wilson, having endeavored to produce the book, were not held as in contempt, but Wilson, continuing to be contumacious, was adjudged to be in contempt and was ordered to be committed "until he delivers to United Wireless Telegraph Company said books called for by said subpœna, and ceases to obstruct and impede the process of this court, or otherwise purge himself of this contempt."

There has been no purpose and no effort to use Wilson as a witness, and his being sworn was a matter of his own insistence. The statements by him in the record were all matters of his own volition. The Government has asked nothing of him, not the identification of the book, not even its production. It can get the book without the help of word or deed from him. It asks only that he cease hindering the company and its officers, who are willing to do what the court has ordered. He has but to leave the books to the custody and control to which they belong. If he is passive, the subpœna will accompl' h its purpose.

There can be no objection to the forn of the process employed. The objection based on the Fourth and Fifth Amendments to the Constitution, if valid, would prevail against a writ of replevin or of mandamus issued at the suit of the company. Appellant is secure against unreasonable search and seizure under any writ whatever. He can not be required to incriminate himself in any proceeding, civil or criminal, by the Government or a private suitor. The question

here is: May he in any case withhold possession of books that are not his; may he suppress evidence other than his own?

The public officer when his term of office has ended, the agent when his agency has terminated, if they have been faithful to their trust, must surrender to their principals, or to their successors, the books and records which evidence their administration of the trust. It can not be that if they have been false to their trust they may keep the records of their administration, because these may contain some evidence of their faithlessness. The false steward has no higher right than the steward who has been true. We may not invade any right of the appellant even though it be to expose and to punish a wrong done by him, but no wrong done by him can add to his right or give him immunity in further wrongdoing. No crime Wilson may have committed has vested him with the custody and control of the company's books against the company's will or made them his own to suppress or destroy as he may choose; and we respectfully submit that the orders of the court below committing him for contempt because of his obstruction of the court's process were right and should each of them be affirmed.

FREDERICK W. LEHMANN,
Solicitor General.

HENRY E. COLTON,
Special Assistant to the Attorney General.

FEBRUARY, 1911.

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Supreme Court of the United States,

OCTOBER TERM, 1910.

CHRISTOPHER C. WILSON, *Plaintiff-in-Error,* *against* THE UNITED STATES.	No. 759.

In Error to the Circuit Court of the United States for the Southern District of New York.

CHRISTOPHER C. WILSON, *Appellant,* *against* THE UNITED STATES.	No. 760.

Appeal from the Circuit Court of the United States for the Southern District of New York.

CHRISTOPHER C. WILSON, *Appellant,* *against* THE UNITED STATES.	No. 788.

Appeal from the Circuit Court of the United States for the Southern District of New York.

Reply Brief for Plaintiff-in-Error (In 759) and Appellant (In 760 and 788).

I.

The brief on behalf of the United States concedes by acquiescence that the letters in the letter press copy book

called for by the supœna *duces tecum* tend to incriminate Wilson. Not only does the Government's brief contain no argument attempting to establish that the letters are not incriminatory of Wilson, but on the contrary the Government's entire brief is written on the theory that the letters do tend to incriminate him.

II.

The correctness of the first point contained in the brief filed on behalf of the United States that the Grand Jury was engaged in an inquiry which gave it authority generally to summon witnesses and to call for the production of books and papers is conceded. The appellant makes no claim to the contrary.

III.

The argument under the second point of the brief of the United States contending for the validity of the subpœna *duces tecum* addressed to the corporation and not to any individual officer thereof cites as authority *Consolidated Rendering Company* vs. *Vermont*, 207 U. S., 541, in which this Court sustained a fine imposed upon a corporation for contempt of Court committed by disobedience of a notice, in substance a subpœna *duces tecum*, addressed to it in its corporate character. In that case which arose in the State Courts of Vermont it appeared that a notice to produce books and papers was served on the corporation, such a notice being expressly authorized by the State laws and being in substance a substitute for a subpœna *duces tecum*. The corporation refused to produce the books and raised a number of objections, which are set forth in the opinion of this Court in that case (pp. 550-1). The corporation did not, however, make any objection based on the fact that the notice was addressed to the corporation, and no such question appears to have been presented by counsel or called to the attention of this

Court or to any other Court during the course of the litigation. It seems therefore that the case cannot be considered as an authority on the validity of the form of the notice or subpœna addressed to the corporation. It will be noticed that in the Vermont case the corporation itself was punished for failure to produce papers which it was in its power to produce, and no attempt was made in that case to deprive an individual citizen of a right or privilege which he claimed under the Constitution.

IV.

The argument of the United States under its third point is to the effect that Wilson's objections to the regularity of the process and procedure (in other words to the form of the subpœna) come too late. This point of the Government's argument seems to be based solely on the fact that Wilson responded to the subpœna and came before the Grand Jury with the book.

In reply to this it may be said that Wilson's appearance before the Grand Jury was at most a concession by him that the subpœna served on him required his appearance before the Grand Jury for the purpose of raising his question of constitutional privilege. Thus if the subpœna had been addressed to Wilson by name, either individually or as president of the corporation, it would have unquestionably have been valid to the extent of requiring him to go before the Grand Jury with the book and there raise his question of privilege.

The Government, in its brief in the Circuit Court of Appeals, expressly stated that it did not claim that if the subpœna had been addressed to Wilson by name he could have been compelled thereby to submit the letter press copy book to the examination of the Grand Jury. On the contrary, in that Court, the Government expressly based its alleged right to compel Wilson to submit the book to the inspection of the Grand Jury on the fact that the subpœna was addressed to the corporation and not to Wilson by name.

It seems clear that Wilson has the right to raise in this Court the point that the subpœna addressed to the corporation did not have any greater effect than a subpœna would have had addressed to him by name and in that connection to attack the validity of the subpœna served on him.

The petition for the writ of *habeas corpus* (fols. 3 and 4 of 788) did attack the form of the subpœna, so that the question was raised in the Court below.

The only alleged waiver of the question of the regularity of the form of subpœna which the Government apparently claims is the appearance by Wilson before the Grand Jury.

V.

The Government's fourth point is that the search and seizure involved in the subpœna *duces tecum* were not unreasonable and therefore not in contravention of the fourth amendment to the Constitution, since the subpœna was specific as to the person to whom it was directed and what was to be produced thereunder, and was issued for the lawful purpose of securing material testimony in an investigation in which the Grand Jury was then engaged.

The Government first quotes, in support of its contention under this point, the language from *Hale* v. *Henkle*, 201 U. S., pp. 74-75, in which the Supreme Court held that an *officer* of a corporation cannot plead the *criminality of the corporation* as a refusal to produce its books and that a *corporation* vested with special privileges and franchises cannot refuse to show *its* hand when charged with an abuse of such privileges.

Neither question is involved in the case at bar.

The brief also cites the case of *Adams* v. *New York*, 192 U. S., 585, in which it appeared that papers which had been taken from the possession of the defendant were introduced in evidence on the trial of the criminal charge against him of having policy slips in his posses-

sion. The Adams case turned upon the principle that when the prosecution have secured possession of evidence against a defendant in a criminal case, they can introduce the evidence no matter what means have been employed to secure it.

That principle is, of course, settled beyond question, and it is for that very reason that Wilson is compelled to maintain his rights at the present time, for if the Government once secured possession, no matter how unlawfully, of the letter press book in question, it could use it as evidence against him.

The rule under which burglar's tools, counterfeit money or other instruments of crime, found on the person of a criminal defendant at the time of his arrest, may be taken from him and offered in evidence, has obviously no bearing upon the case at bar.

The whole argument, so far as the fourth amendment is concerned, seems settled by the language of *Boyd* v. *United States*, 116 U. S., 616, cited in the second point of appellant's main brief, where this Court said:

> "It is our opinion, therefore, that a compulsory production of a man's private papers to establish a criminal charge against him or to forfeit his property is within the scope of the Fourth Amendment to the Constitution, in all cases in which a search and seizure would be; because it is a material ingredient and effects the sole object and purpose of search and seizure."

VI.

Under the Government's fifth point numerous authorities are cited directed to the Government's contention that Wilson, if required to produce the book, would not thereby become a witness against himself, the argument being, as

we understand it, that inasmuch as the book called for was the property of the corporation and had come into Wilson's custody simply as representative of the corporation, it was a public and not a private paper within the meaning of the decisions and was therefore not within the protection of the fifth amendment.

In construing the authorities cited on behalf of the United States under this point, it must be remembered that concededly all the letters in the letter press copy book in question are copies of letters dictated and signed by Wilson and that the book was in his possession long before any subpœna was served upon him for its production.

The first class of cases cited on the Government's brief are cases in which a record was kept under specific requirements of a statute, which provided that the record should be public and at all times open to official inspection and that failure to produce the record before a Grand Jury, when required, should constitute a misdemeanor.

Thus in *State* v. *Davis*, 108 Missouri, 666; 18 So. West., 894, druggists in the State of Missouri were permitted to sell liquor only on the prescription of a physician, and the statute provided that such prescription should be preserved and produced in Court or before any Grand Jury when required, and on the failure of the druggist to produce the same, he should be deemed guilty of a misdemeanor. The Court in the case cited held that by reason of the provisions of the statute, the prescriptions became public records and not private papers, and were therefore not within the protection of the fifth amendment. The Court in deciding this case also dwelt on the fact that the druggist voluntarily brought himself within the provisions of the statute by engaging in the sale of liquor thereunder. It is further to be noted that the acts of the druggist in the Davis case were purely ministerial. His duty was first, not to make sale of liquor without a prescription; and, second, upon receiving a prescription for the sale of liquor, to insert it in a book.

To the same effect and governed by the same reasoning are:

State v. *Donovan*, 10 North Dakota, 203;
People v. *Henwood*, 123 Mich., 317;
State v. *Davis*, 69 So. Eastern (W. Va.), 639.

In *L. & N. R. R. Co.* v. *Commonwealth*, 21 Kentucky Law Rep., 239, the paper sought to be produced was a tariff sheet which the law required to be publicly posted. This was, of course, held not to be a private paper.

In the case of *McElree* v. *Darlington*, 187 Pa. St. Rep., 593, the defendant in a criminal case had been president of a corporation which was in the hands of receivers. The District Attorney, seeking to prosecute the former officer of the corporation for acts done in regard to the corporation, applied to the Court for leave to examine the books of the corporation *then in the hands of the receivers*. It was sought to prevent such an inspection, and the Court said, in the portion of the opinion quoted in the Government's brief:

> "An officer or employee of a corporation, who is under indictment for embezzlement of its funds, may not require of his employer a suppression or concealment of his own entries in its books."

This case is, of course, inapplicable to a situation where the books are in the possession of the officer at the time they are sought by the subpœna.

In the case of *Pray* v. *Blanchard Co.*, 95 App. Div., 423, the language quoted in the Government's brief is merely dictum, the real grounds for the Court's decision being stated in the preceding paragraphs not quoted by the Government, and which read as follows:

> "After issue had been joined the plaintiff procured an order directing that Todd and the president of said corporation be examined before trial and their depositions taken pursuant to Sections 870-876 of the

Code of Civil Procedure, and for that purpose that they appear at a time and place and before a referee named in the order, and submit to an examination concerning the matters relevant to the issues raised, and that they produce, upon such examination, the stock ledger, minute book and all books on account of the said corporation, the production of such books, however, '*being only for the purpose of refreshing the recollection of the witnesses and aiding their memories in the oral examination; such books not being produced for the purpose of examination or inspection by the plaintiffs or their counsel.*' No appeal was taken from this order. At a hearing thereafter had before the referee, in pursuance of the order, Todd appeared and was sworn. He was then asked, among other questions, if he had produced the stock ledger, minute book or books of account of the C. A. Blanchard Company, or any of such books, and he replied: 'I decline to produce them on the ground that they would tend to incriminate myself,' and he did not produce any of such books, although directed by the referee to do so. A motion was then made to punish him for contempt of court in refusing to comply with the order. The motion was denied and plaintiffs have appealed."

"The order must be reversed. The Court had directed him by its order to produce these books. They were not his books, but the books of the corporation. That order was not appealed from. It was in force and if he were not satisfied with it, then he should have appealed. He could not acquiesce in it by not appealing and then openly defy the Court by refusing to comply with it. The books were to be produced for the purpose of enabling him to refresh his recollection concerning the subject of the examination. The mere production of the books could not in and of itself tend to incriminate him and whether the answers he might make to questions thereafter

put to him would have that effect is a question not now before the Court and which we cannot now determine. All we determine is that he was bound to comply with the order of the Court, and in refusing to do so was guilty of contempt and should have been punished therefor."

It will be noticed that the Court and plaintiff's counsel in making the order referred to in the above quotation were extremely careful to avoid the possibility of an infringement upon the constitutional rights of the witness, and thereby this case becomes an authority in favor of the appellant herein instead of against him.

In *People* v. *Coombs*, 158 N. Y., 532, the subpœna called for public records in a public office, in the custody of a clerk who was paid by the city. The Court, in its opinion, said:

"The subpœna did not call for any private papers, only for public documents."

The case of *Ex parte Hedden*, 90 Pac. (Nevada), 737, which the Government's brief claims is not to be distinguished from the case at bar, is clearly distinguishable on several grounds. In fact, in appellant's main brief (p. 23), the appellant conceded that under such circumstances, as shifting of possession of a document after service of a subpœna, punishment for contempt might properly follow. In the Hadden case the following facts appear:

The Grand Jury was investigating a criminal charge of perjury against Hedden, who was superintendent of the Tonopah & Goldfield Railroad Company. A subpœna *duces tecum* was issued addressed to Lyon and Hedden, calling for a number of books of the Tonopah & Goldfield Railroad Company (ledger, vouchers, record of operating expenses, copy of Interstate Commerce report, monthly reports made to the board of directors, and other books

showing cash on hand and in the bank and showing the properties of the company). It was undisputed that Lyon (who was not implicated, against whom the investigation was not directed, and whom the books did not tend to incriminate) was in possession of all the books when the subpœna was served on him. After the service of the subpœna Lyon received a telegram from the general counsel of the railroad stating that Hedden had been served with the subpœna, and directing Lyon to turn over all the books to Hedden. This Lyon did in obedience to the telegram. Lyon appeared before the Grand Jury on the return of the subpœna and stated that he was unable to produce the books because he did not have them. Hedden appeared before the Grand Jury and stated that he refused to produce the books by reason of his constitutional right to refuse to testify against himself, and thereupon the Grand Jury presented an information charging Hedden with contempt, and an order was made by the Court committing Hedden to the custody of the sheriff until he complied with the order. The matter being presented on *habeas corpus*, the Court, after quoting at length from the Chapman case (153 Fed., 371), in which Judge Gilbert of the United States Circuit Court had said that the books of the Barber Lumber Company in Chapman's hands were made under Chapman's directions and were to all intents and purposes his own books, &c., said:

> "In the case of petitioner Hedden it cannot be said that the corporate books and papers in his possession are to all intents and purposes his own books, that they are records made by him or under his direction, or that they were ever in his charge or control prior to the day before he and Lyon were required to appear before the Gand Jury. In fact, it appears that the petitioner himself, at the time he appeared before the Grand Jury, regarded the secretary of the company, Mr. Lyon, as he himself testified before the Grand Jury, as the 'legal custodian of the books' and himself only 'temporary custodian.' "

Then follows the portion of the opinion quoted at pages 38 and 39 of the Government's brief. It will be noticed that in the quotation in the Government's brief, page 38, an omission is indicated in the third line from the bottom of the page. Immediately following the words "witness against himself," in the opinion of the Court, is the following significant language:

> "In considering this contention we deem it entirely proper to take into consideration how the petitioner came into the possession of the documentary evidence in question. When the subpœna was served on Hedden and Lyon, the latter had possession of and was the natural and proper custodian of the books, papers and documents required by the subpœna to be produced. It was Lyon's duty to produce before the Grand Jury what the subpœna called for, and if he failed without good reason so to produce them, he became liable to be punished for a contempt of Court. * * * The Trial Court evidently concluded that the transfer of the possession of the documentary evidence in question from the custody of Lyon to that of Hedden the day before the Grand Jury met, as found by Judge Langan, was for the purpose of putting it, if possible, out of the reach of the Grand Jury's investigation."

As already stated appellant in the case at bar conceded in his main brief that shifting of books or papers after the service of a subpœna *duces tecum* might be contempt of Court. In the case at bar it is not disputed that Wilson had exclusive possession of the book from June, and it appears in the record that the first subpœna for the production of the book was served upon him early in October. Wilson also swears in his petition for a writ of *habeas corpus*, and the allegation is not traversed, that he did not come into possession of the books for the purpose of avoiding the service of the

subpœna or in anticipation of the service of a subpœna, and there is not a syllable on the record from which the contrary can even be inferred.

Another ground of distinction exists between this case and the Hedden case by reason of the fact that the letters sought in this case are actually private papers, being copies of letters dictated personally by Wilson, and, as said in the Chapman case and quoted in the Hedden case, "to all intents and purposes his own books," being "records made by him or under his direction."

The case of *Langdon* v. *The People*, 133 Ill., 382, cited on the Government's brief was a case involving official documents.

Not a single case is cited in the Government's brief in which the papers involved were papers of a private corporation, except the Pennsylvania case of *McElree* v. *Darlington*, in which case the papers were not in the possession of the incriminated officer, but were in the hands of a *receiver* of the corporation; and *Ex parte Hedden*, in which case *possession had been shifted* after the service of the subpœna *to the incriminated officer from an officer who was not incriminated*, and in which case *the incriminated officer had had no part in creating the books and documents in question, and had never had custody or control of any of them until after the service of the subpoena.*

It is respectfully submitted that the rule stated in Wigmore on Evidence, §2259, is a correct statement of the law as it has always been understood:

> "What is the effect of these two premises upon the questions that arise when discovery is sought from an officer or employee of a corporation—in the usual case, by a demand for the production of the corporate books?
>
> In the first place, the employee or officer cannot refuse to produce on that ground that the disclosure would affect the corporation. On the other hand, where the corporate misconduct involves also the

> claimants misconduct, or where the document is, in reality the personal act of the claimant, though nominally that of the corporation, its disclosures are virtually his own, and to that extent his privilege protects him from producing them. Finally, public official books, being the property of the State, are always accessible to its representatives and usually to the public; and no guilty officer, merely by his own entries in them, can any more insist on privacy than if he were to have gone to the judicial records and there inscribed a forgery."

So far as the argument of the Government turns on the attitude of the corporation in passing resolutions directing Wilson to turn over the books, it may be said that Wilson cannot be held in contempt for disobeying the orders of the directors of the corporation. It is apparent from the record that the action of the directors was not based on any desire arising from the needs of the corporation to get the books, but was simply under stress of contempt proceedings pending against them on the part of the Government. The book was the president's book, and had always been in his possession as president.

It is suggested in the brief of the United States that if the proceedings were by the corporation against Wilson for possession of the book, there would be no question as to the result. This, of course, is not the case before the Court, but so far as it is pertinent at all it seems to be an argument in favor of Wilson in this case, because if the corporation can secure the books from Wilson by reason of the corporation's property rights therein, then there is no reason for depriving Wilson of his constitutional rights in the present proceeding.

The main contention of the Government's brief is an effort to establish that Wilson's letters, written as president of the corporation, are not private papers within the meaning of the decisions under the fifth amendment of the Constitution.

To this we answer, first, that records of a private cor-

poration are just as private within the meaning of the decisions under the fifth amendment of the Constitution as a man's own personal letters and papers; and, second, assuming that records of the corporation, which Wilson never had in his custody, and with the making of which he had nothing to do, might not be his private papers within the meaning of the decisions, nevertheless, letters which he personally wrote, whether as president or individually, contained in a book of which he has the custody, are private papers within the meaning of the decisions, and are protected by the fifth amendment.

It is respectfully submitted that the order in each of the three cases should be reversed.

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